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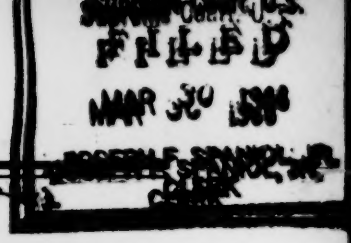

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

*Appellant*,

—v.—

NEW HAMPSHIRE,

*Appellee*.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

## JURISDICTIONAL STATEMENT


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March 30, 1988

## QUESTION PRESENTED

Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application thereof denying utility investors any recovery of or on investment in electric generating plant fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?

## PARTIES BELOW

The petitioner below was Public Service Company of New Hampshire ("PSNH"). The State of New Hampshire was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights were intervenors in the New Hampshire Supreme Court.

## STATEMENT PURSUANT TO RULE 28.1

Public Service Company of New Hampshire has no parent and no publicly held affiliates or subsidiaries.

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IN THE

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OCTOBER TERM, 1987

**No. ____**

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

*Appellant*,

—v.—

NEW HAMPSHIRE,

*Appellee*.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

## JURISDICTIONAL STATEMENT

Public Service Company of New Hampshire appeals from the final judgment of the Supreme Court of New Hampshire, dated January 26, 1988, holding that N.H. Rev. Stat. Ann. § 378:30-a does not violate the Fifth and Fourteenth Amendments to the United States Constitution when applied to the fixing of electric utility rates even in the face of a financial emergency of the utility.

## OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire (130 N.H. ____, ____ A.2d ____ (January 26, 1988)) (Appendix ("App.") A) is not yet officially reported. The Report and Order of the New Hampshire Public Utilities Commission ("PUC" or the "Commission") on remand dated March 24, 1988 is at App. B. The Report and Order No. 18,788 (initial transfer order) of the PUC (August 11, 1987) is at App. C. The

Order of the Supreme Court of New Hampshire deferring acceptance of the transferred questions and dated September 2, 1987 is at App. D. The PUC's fact-finding Report and Order No. 18,873 (October 14, 1987) and Report and Order No. 18,890 (November 2, 1987) are at App. E and F, respectively. The PUC's transfer of a third question (November 5, 1987) is at App. G. The Order of the Supreme Court of New Hampshire accepting the transfer and dated November 4, 1987 is at App. H. The New Hampshire Supreme Court's Order accepting the third question for transfer and dated November 17, 1987 is at App. I. App. J is *Public Service Co.*, 65 N.H.P.U.C. 45 (1980), a decision cited by the New Hampshire Supreme Court in the decision appealed from. App. K is a copy of the Notice of Appeal filed in the Supreme Court of New Hampshire on March 25, 1988.

## JURISDICTION

The Supreme Court of New Hampshire entered judgment on January 26, 1988 and remanded the proceeding to the New Hampshire Public Utilities Commission, which dismissed the proceeding on March 24, 1988. Public Service Company of New Hampshire filed a timely notice of appeal in the Supreme Court of New Hampshire on March 25, 1988. This appeal is being docketed within 90 days of the judgment below. This Court has appellate jurisdiction under 28 U.S.C. § 1257(2) (1982).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V, clause 4:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, clause 3:

"[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

N.H. Rev. Stat. Ann. § 378:30-a (1984):

> "*Public Utility Rate Base; Exclusions.* Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers."

## STATEMENT OF THE CASE

On January 28, 1988 PSNH, New Hampshire's largest electric utility, became the first major public utility since the Depression to file for protection from creditors under the Bankruptcy Code. It should never have happened.

PSNH is the largest single owner (35.6%) of the Seabrook Nuclear Generating Station ("Seabrook Station" or "Seabrook"). Seabrook has been physically complete since October 1986, but has not been placed into service because it has not received operating authority from the United States Nuclear Regulatory Commission. A confluence of forces—judicial, legislative, regulatory, political and economic—all related to PSNH's investment in Seabrook Station, resulted in PSNH's inability to support that investment through access to financial markets, to pay equity investors any return on investment, and ultimately, to service the debt it had incurred in an attempt to meet its statutory obligation to supply electricity to the people of New Hampshire. At the root of the problem is the New Hampshire statute which bars rates or charges based upon "Construction Work In Progress," the so-called "anti-CWIP" law, N.H. Rev. Stat. Ann. § 378:30-a, enacted effective May 7, 1979, which, according to the Supreme Court of New Hamp-

shire, "simply forbids return on or recovery of investments through utility rates before the project is completed and providing service to customers." *Petition of Public Service Co.* (App. A at 9a).[1]

As part of PSNH's response to its extreme financial crisis, PSNH sought an emergency rate increase, expressly to avoid bankruptcy. It argued that the New Hampshire anti-CWIP law is unconstitutional as applied under the circumstances, because the law would deprive PSNH of its financial integrity, without a meaningful balancing as mandated by *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"), and without a hearing by the PUC to establish just and reasonable rates. The Supreme Court of New Hampshire disagreed, and both the bankruptcy and this appeal followed.[2]

---

1 This appeal raises an issue very similar to that in a case in which this court recently noted probable jurisdiction, *Duquesne Light Co.* v. *Barasch*, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988) (No. 87-1160). In the *Duquesne* case, the Supreme Court of Pennsylvania interpreted that state's anti-CWIP statute to deny utility investors any recovery of or on prudently incurred investment in cancelled electric generating units and reversed the ratemaking agency's determination that an appropriate balancing of investor and consumer interests required recovery of such investment. That court determined that the "used and useful" ratemaking concept was of constitutional dimension.

The utilities in *Duquesne* have argued that the Pennsylvania anti-CWIP statute is unconstitutional on its face. PSNH argues that New Hampshire's statute is unconstitutional as applied, since its present rates are confiscatory in failing to provide for its financial integrity. Thus, while a favorable ruling by this Court on the merits of the Pennsylvania utilities' appeal will certainly also necessitate a reversal of the decision by the New Hampshire Supreme Court, it is important to note that even were this Court to find that anti-CWIP laws such as these may, under some circumstances, pass constitutional muster, the application of the New Hampshire anti-CWIP law would still be unconstitutional as applied to PSNH.

2 The New Hampshire court's ruling left PSNH without hope of an emergency rate increase, and left it with no recourse other than to seek protection from creditors under Chapter 11 of the United States Bankruptcy Code (*see* Case No. 88-00043, U.S. Bankruptcy Court for the District of New Hampshire). On March 24, 1988 the PUC—

(*Footnote continued on next page*)

PSNH is obligated by New Hampshire statute to supply adequate electric power to its service area. N.H. Rev. Stat. Ann. § 374:1 (1984).[3] This statutory obligation to serve includes the provision of sufficient amounts of electricity to meet whatever demand is needed, an obligation commonly found in public utility statutes nationwide. In order to provide sufficient capacity to meet that obligation, in 1972 PSNH commenced planning and construction of Seabrook Station.[4]

From the outset, Seabrook Station received strong regulatory support. The New Hampshire Public Utilities Commission granted a Certificate of Site and Facility for the Seabrook Project on January 29, 1974, which included a finding that the project was consistent with the public good. The Nuclear Regulatory Commission has reviewed the project's construction at various stages, and has acknowledged that it meets or exceeds the increasingly complex and stringent construction safety requirements that were imposed over its ten-year construction period. On May 12, 1981 the New Hampshire legislature, by joint resolution, supported the completion of both Seabrook units. Construction of Seabrook Station Unit One was completed in October, 1986. Since that time, the plant has been in regulatory limbo, unable to proceed to low power testing or full power operation due to opposition of Governor Dukakis and the Commonwealth of Massachusetts to evacuation planning and due to the activities of anti-nuclear special interest groups intervening before the NRC and elsewhere. At July 31, 1987,

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(*Footnote continued from previous page*)

although finding on the merits "that a financial emergency did and does exist" (App. B at 26a)—dismissed the emergency rate case, confirming that "[u]nder that supreme court opinion and the findings of fact made in this case, the commission lacks authority to grant PSNH a rate increase" (*id*).

3 "§ 374:1 Service. Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable."

4 PSNH originally owned 50% of the planned 2-Unit project. Today, PSNH owns 35.56942%. There are eleven other "joint owner" utilities in Connecticut, Massachusetts, New Hampshire and Vermont.

PSNH had invested approximately $2 billion in Seabrook, representing 69% of the Company's total assets.

During the early years of the project, PSNH sought to fund its then 50% share of the project through internally generated funds and regular borrowings. In 1977, PSNH sought to have included in its rate base a portion of its construction costs under the category of Construction Work In Progress ("CWIP").[5]

5 The New Hampshire PUC has explained the methodologies of financing construction concisely:

> "Any public utilities commission has in essence two ways of treating financing costs. The first method is to include CWIP in rate base. The account, construction work in progress (CWIP), is included in rate base and thereafter earns a return, which represents the financing costs of plant under construction. The rate-making effect of such treatment is to increase rate base and thereby increase the rates to present consumers. ***Because CWIP is added to rate base, the financing costs associated with construction are recovered currently.***" (Emphasis supplied.)
>
> "The second method is to exclude CWIP from rate base. The financing costs incurred during construction, AFUDC (allowance for funds used during construction), are accumulated, capitalized, and charged to the utility's CWIP account, together with other costs associated with construction. When the plant begins to actually generate electricity (in the case of an electric utility's generating plant) the rate base *then and only then* includes the total labor and materials costs, as well as the accumulated AFUDC (financing costs). At this time of actual generation, the company earns a rate of return on the AFUDC and recoups the same by depreciation." *Public Service Co.*, 65 N.H.P.U.C. 45, 48 (1980) (emphasis in original; citation omitted) (appended hereto as App. J).

Rejection of the CWIP method means that both construction costs and financing costs associated therewith must be borne entirely by investors in the first instance. Thus, investors must furnish not only the cash for additional "bricks and mortar," but also the cash to compensate earlier investors for previously-raised construction cash, until the construction is complete and in service. This continuing cycle of financing results in geometric increases in the need for external funds, due to the effects of compounding. If access to financial markets fails, the utility loses access not only to sources of additional construction cash, but also to sources of cash to pay finance charges on the investment in incomplete construction. By definition, the utility is not permitted current rates to meet those finance charges and, in the absence of any other source of cash, the utility will, in time, become unable to meet its obligation to pay finance charges in addition to its operating costs, resulting in financial impairment, and eventually collapse.

This would permit PSNH to gain a return on its construction investment through rates and thereby to support the financing costs associated with that investment.

By order of the PUC dated May 25, 1978 (Order No. 13,162), PSNH was permitted to include a portion of CWIP in its rate base, which was upheld by the Supreme Court of New Hampshire in *Legislative Utility Consumers' Council* v. *Public Service Co.*, 119 N.H. 332, 402 A.2d 626 (1979) ("*LUCC* v. *PSNH*").[6]

6 In *LUCC* v. *PSNH*, *supra*, the court rejected arguments that allowing CWIP investment in rate base either would result in rates which were not just and reasonable or was barred as not being "used and useful" under N.H. Rev. Stat. Ann. § 378:27 (1984). Instead, in discussing whether the inclusion of CWIP would be just and reasonable, the court said that the controlling question is " 'the *necessity*' of including CWIP in the rate base" (119 N.H. at 345, 402 A.2d at 635 (emphasis added)). The court appears to have defined "necessity" in terms of the financial integrity of the Company. Thus, the court concluded that the "most compelling testimony [of necessity] was that without CWIP in the rate base, the Company would 'teeter precariously on the brink of financial disaster.' " 119 N.H. at 350, 402 A.2d at 638. The court had previously stated:

> "We have held that a public utility must be given the opportunity to earn revenue 'sufficient to assure the investor's confidence in the financial soundness of the utility and enough to maintain and support its credit so that it will be able to raise money necessary to improve and expand its service' . . . . Because it is fundamental that ratemaking must take into account the need for the utility to maintain the confidence of investors, *Bluefield Water Works & Improvement Co.* v. *Pub. Serv. Comm'n*, 262 U.S. 679, 693, 43 S. Ct. 675, 67 L. Ed. 1176 (1923); *accord*, *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944), the Commission properly exercised its regulatory function by allowing the Company to prove the necessity of including its CWIP in the rate base." 119 N.H. at 345-46, 402 A.2d at 635.

Furthermore, in discussing the circumstances under which an investment in CWIP could be found to be "used and useful," the court stated:

> "The factual determination that the Commission had to make in its used and useful analysis was whether the Company's CWIP represents an expenditure incurred in raising capital to finance a reasonable construction program that will enure to the benefit of energy consumers by assuring a future supply of electricity." 119 N.H. at 344, 402 A.2d at 634.

However, effective May 7, 1979, the New Hampshire legislature enacted N.H. Rev. Stat. Ann. § 378:30-a (1984), the so-called New Hampshire anti-CWIP statute. The previously allowed CWIP was subsequently removed from PSNH's rate base and since that date, PSNH has been barred from any recovery either of or on its Seabrook investment.[7] Because the anti-CWIP law prohibits current return on construction investment, and because of the consequent effect of compounding of financing costs, the financial condition of PSNH was progressively weakened. It was forced to borrow, at increasingly higher rates, to finance its expenditures.

In the Spring of 1984, PSNH faced a major financial crisis. Its commercial bankers indicated a refusal to lend additional funds under PSNH's revolving credit agreement. Construction of Seabrook Station was suspended for a period of two-and-one-half months. PSNH was forced to suspend all dividends on common and preferred stock, which suspension remains in effect. Indeed, the PUC has prohibited payment of dividends without PUC approval. *Public Service Co.*, 69 N.H.P.U.C. 522, 540 (1984). PSNH was eventually able to borrow additional funds, at rates as high as 20 percent, in order to continue the project, to obtain cash necessary to pay interest on its outstanding debt and to meet its statutory obligation to supply electricity.

In the Spring of 1987, PSNH sought to raise $150,000,000 by issuance of floating rate notes, in order to pay for its operating expenses and debt service, but was unable to market the entire issue. It became obvious that PSNH's access to financial markets was foreclosed. In an attempt to stave off bankruptcy, PSNH commenced a three-pronged survival program which involved: 1) institution of further immediate and stringent cash conservation; 2) a plan for restructuring its outstanding debt;

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7 In utility parlance, return *of* investment is accomplished, generally, through amortization or depreciation charges while return *on* investment is realized through a rate of return on the amount of the investment in rate base. For a more detailed explanation *see* C.F. Phillips, Jr., *The Regulation of Public Utilities*, 281-377 (1984). Neither type of recovery is permitted under the New Hampshire anti-CWIP law.

and 3) a request for a 15 percent emergency rate increase, filed August 5, 1987, claiming an emergency rate base increment which would include some $464,000,000 (27%) of the Seabrook investment. At PSNH's rate of return, this would have provided some $70,000,000 per year in additional revenues. This amount would have provided less than 20 percent of the $366.6 million in additional annual revenues needed to service PSNH's debt from internal funds. The balance was to be met through the debt restructuring. The requested increase constituted the bare minimum needed to survive.

Because this emergency rate increase would implicate the strictures of the anti-CWIP law, at the same time PSNH also requested, pursuant to N.H. Rev. Stat. Ann. § 365:20 (1984), that the PUC certify the following question to the New Hampshire Supreme Court:

> "Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> (1) Its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
>
> (2) Its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms; and
>
> (3) Accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity.
>
> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called 'anti-CWIP' statute?" App. A at 3a.

In its Report and Order No. 18,788 (August 11, 1987, DR 87-151) (the Transfer Order) (App. C), the Commission granted PSNH's request, including in its transfer order PSNH's Application and affidavits in support thereof, and also transferred to

the New Hampshire Supreme Court the following additional question of law:

> "Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, notwithstanding the requirements of RSA 378:30-a?"

Following a prehearing evaluation conference, the New Hampshire Supreme Court ordered that acceptance of the transferred questions would be deferred until the Commission had addressed the following issues with findings of basic facts:

a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.

b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the amounts of the company's investment prior to that date, between that date and the effective date of § 30-a, and thereafter.[8]

The PUC reported to the New Hampshire Supreme Court its findings of basic facts on those issues along with other findings in Report and Order No. 18,873 (October 14, 1987) and Report

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8 *See* App. D. The court noted: "The court does not sit as a fact-finding body on such a case transferred by the commission . . . . The court therefore requires the commission to make findings sufficient to provide a factual basis for transferred constitutional questions, when those questions rest upon specific factual claims." App. D at 44a. The court thus indicated that these were the only additional facts it needed to answer the certified questions.

and Order No. 18,890 (November 2, 1987) (App. E and F, respectively).[9] In particular, the PUC found that:

> "Based on the foregoing, the commission finds that to put PSNH in a position where it is reasonably likely to meet its cash obligations including making interest payments as they come due under current obligations, paying off existing debt as it matures and paying for expansion of services for customers, PSNH would need additional revenues from a rate increase. Such rate relief need not necessarily be provided by adding a portion of the company's investment in Seabrook I in the company's rate base; but one or more of the following three methodologies must be utilized under traditional ratemaking to provide such revenues: inclusion of construction work in progress in rate base, enhancement of expenses to reflect capitalization that exceeds the allowable rate base, or enhancement of the rate of return. As discussed above, *all such actions seem to violate the dictates of RSA 378:30-a and supreme court cases related thereto.*" App. E at 56a. (Emphasis added; footnote omitted).[10]

The New Hampshire Supreme Court heard argument on December 15, 1987 and issued its final decision on January 26, 1988. In that decision, the court ruled that the anti-CWIP law was not unconstitutional as applied, regardless of PSNH's financial condition. It never even mentioned PSNH's statutory obligation to provide power. The court simply reasoned that the New Hampshire legislature itself had undertaken the constitutionally mandated balancing in adopting the anti-CWIP statute, that the legislature had determined that the risk of loss

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9 In addition, on November 5, 1987, the PUC requested the New Hampshire Supreme Court to accept and determine a question of state statutory construction which is not an issue on this appeal. *See* App. G.

10 By this finding the PUC established factually that the rates PSNH was allowed to charge were confiscatory as defined in *Hope*, a finding which the New Hampshire Supreme Court specifically requested and then, as discussed, *infra*, effectively ignored.

from incomplete construction or delayed placement into service was to be borne entirely by the investor, and that this purported "balancing" satisfied the *Hope* requirements. App. A at 11a. The court, without benefit of factual support, and in apparent misconstruction of a PUC decision, concluded that PSNH investors presumably had been compensated for the resulting added risk through an "enhanced rate of return."

In actuality, what the New Hampshire court held was that PSNH is not even entitled to a *Hope* hearing to determine whether its proposed increase provides a just and reasonable rate under all the circumstances. This heavy thumb on the scale of *Hope* balancing is exactly what is forbidden by the Constitution. It is from this ruling that PSNH appeals.

## THE QUESTION PRESENTED IS SUBSTANTIAL

### I. The Power to Regulate Is Not a Power to Destroy

Regulation of public utility rates rests on a theoretical basis that is often referred to as the "regulatory compact." This "compact" was first established in broad outline by this Court more than one hundred years ago in the *Railroad Commission Cases*, 116 U.S. 307, 345 (1886), where the potential for destruction from excessive regulation was fully recognized. Utility investors implicitly must surrender their potential ability to reap any windfall profits and their freedom to supply or not supply services to their customers, in return for a reasonable but locked-in margin of return set by state regulatory agencies.

A leading regulatory economist and former chairman of the Civil Aeronautics Board and of the New York Public Service Commission, Dr. Alfred H. Kahn, described the nature of the regulatory compact as follows:

> "The essential basis of public-utility regulation is an implicit bargain between consumers and investors that, in exchange for a monopoly franchise, the company accepts the strict legal obligation to serve all customers on reasonable terms. This means that shareholders accept a return on investment equivalent only to something like the market cost of capital—the minimum that investors must see a reasonable prospect of earning if they are to put up the necessary funds—along with the duty conscientiously to anticipate the future needs of the public and to make whatever investments may be necessary in order to meet them efficiently.
>
> "This means that if the company makes a particularly successful investment—and there have been many such—the lion's share of the benefit goes to the consumer. . . .
>
> "The other side of the bargain is, and has to be, that investors are permitted to earn that same minimum return also on the dollars that they put into investments that turn out sour. If they can earn the cost of capital only on the

successes and not on the failures, it follows that they will earn less than the cost of capital on all their dollars, taken together. And investors won't play that game once they understand that those are going to be the rules.

"That does not mean consumers have to bear the costs of grossly imprudent ventures; that is the justification for public utility commissions determining the prudency of utility investments. No investors can legitimately expect that. But the only test of prudence consistent with the regulatory bargain has to be as of the time the commitments were made." Kahn, "Who Should Pay for Power-Plant Duds," *Wall Street Journal,* Aug. 15, 1985, p. 26, col. 3, at cols. 3-4.

In 1944, this Court was called upon to define the measure of constitutional protection the regulatory compact affords the investor, in light of the strong consumer interest against exploitative rates. In *Hope*, *supra*, the Court held that a utility has a constitutional right to receive just and reasonable rates. The Court defined such rates as those which enable the utility to meet its operating expenses and capital costs, and which assure market confidence in its financial integrity so as to allow it to maintain its credit, attract capital, and to pay dividends. Subject only to a limitation of ratepayer exploitation, the right to nonconfiscatory, just and reasonable rates is otherwise absolute.

Because the interests of ratepayers and investors sometimes diverge, this Court has developed a flexible, yet practical, approach for determining whether the "just and reasonable" criterion has been met in a particular case. In *Hope*, the Court abandoned the traditional "fair return on fair value" ratemaking formula for measuring whether investor interests had been adequately satisfied. *See Smyth* v. *Ames*, 169 U.S. 466 (1898). In its place, the Court devised a balancing formula wherein *utility financial integrity* represents one side of the equation. *Hope* held that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and

to compensate its investors for the risks assumed" were required to meet the constitutionally-mandated "just and reasonable" standard. *Hope, supra*, 320 U.S. at 605.[11]

The *Hope* decision specified the following indicia for measuring the investor interest to be weighed against the ratepayer interest:

> "[T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. *These include service on the debt and dividends on the stock.*" 320 U.S. at 603 (emphasis added).[12]

In applying the standard of confiscation enunciated in *Hope*, the Court mandated that in reviewing whether a rate is constitutionally acceptable, the regulator and the reviewing court must consider the "end result" of the rate-making process—the rate itself—and not the particular methodology used in reaching that rate. *Hope, supra*, 320 U.S. at 602 ("It is not the theory but the *impact* of the rate order which counts") (emphasis added); *FPC* v. *Memphis Light, Gas and Water Division, supra*, 411 U.S. at 474; *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 605 (1945). Moreover, there must be a considered

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11 *Cf. Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) ("[T]he just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards"); *Jersey Central Power & Light Co.* v. *FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (*en banc*) ("[T]he *Hope* test defines the point at which a rate becomes constitutionally confiscatory"). *See FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

12 *See also FPC* v. *Memphis Light, Gas & Water Division*, 411 U.S. 458, 474, 465-66 (1973):

> "[U]nder *Hope Natural Gas* rates are 'just and reasonable' only if consumer interests are protected *and if the financial health of the [utility] in our economic system remains strong* [measured by] . . . revenues [sufficient both] . . . to maintain [the utility's] credit and to attract capital.' " (Emphasis added; citation omitted.)

judgment which balances all of the pertinent factors. A reviewing court, in assessing a rate order:

> "must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. *The court's responsibility is* not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead *to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.*" *Permian Basin Area Rate Cases, supra*, 390 U.S. at 792 (emphasis added).

However, this balanced approach to regulation is today in disarray throughout the United States. Utilities teeter on the brink of financial collapse in New York, New England, Louisiana and Texas. Commissions seeking to achieve a constitutional balance, and to avoid confiscation of utility property, are routinely reversed on the basis that the financial burden of nuclear power, the national pride and goal of the early 1970's, must simply be borne by the investors, while the ratepayers wash their hands of the whole affair.[13] This is the situation with the four nuclear plants in question in the *Duquesne* case in which this Court has noted probable jurisdiction. Additionally, disallowances for "over-capacity," running to unimaginable proportions, are routine. *See, e.g., Kansas Gas & Electric Co.* v. *State Corp. Comm'n*, 239 Kan. 483, 720 P.2d 1063 (1986), *prob. juris. noted*, 107 S. Ct. 1281, *appeal dismissed*, 107 S. Ct. 2171 (1987);[14] *Kansas City Power & Light Co.* v. *State Corp.*

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13 On the other hand, no court and certainly not the New Hampshire Supreme Court has suggested that the other part of the regulatory compact, the part which imposes on the utility a duty to supply electricity, has in any way been abrogated.

14 *In Kansas Gas & Electric Co.*, the appeal was dismissed as moot with respect to the takings question; hence the utility's equal protection challenge based on that question was dismissed for want of a substantial federal question.

*Comm'n*, 239 Kan. 489, 720 P.2d 1063 (1986), *prob. juris. noted*, 107 S. Ct. 1281, *appeal dismissed*, 107 S. Ct. 3280 (1987) (case dismissed pursuant to agreement of the parties). And finally, one major utility, PSNH, was forced over the ultimate brink.[15]

The lower courts show no unified understanding of the applicable law. In a notable decision last year, an *en banc* panel of the United States Court of Appeals for the District of Columbia Circuit, in *Jersey Central Power & Light Co.* v. *FERC*, *supra*, concluded that when a ratemaking agency precludes any *Hope* balancing by summary application of its own regulatory standard and the financial integrity of a regulated utility is thus jeopardized, the owner of a cancelled nuclear plant is entitled to a full-scale *Hope* hearing as to whether a reasonable return on investment had been afforded to investors, "taking into account whether any higher return would amount to exploitation of consumers" (810 F.2d at 1181, n.3). Writing for the *Jersey Central* court, Judge Bork focused on *Hope's* requirement of

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15 It should be noted that PSNH's bankruptcy does not render this appeal moot. A utility's value is measured, in part, by what it can earn in rates, its "going concern" value. Whether or not Seabrook costs are recoverable in rates is a central element in the valuation of the debtor. Any meaningful reorganization plan depends upon resolution of that issue. In addition, the Bankruptcy Code provides that in order to confirm a plan of reorganization which changes utility rates, approval of the regulator is required:

"§ 1129 Confirmation of plan

"(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

"(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6) (1982 & Supp. IV 1985).

Accordingly, it is of vital importance, both to an effective reorganization and to the State of New Hampshire, to know whether or not Seabrook costs may be included in rate base despite the anti-CWIP law, in order to restore the financial condition of the utility that has been destroyed by its unconstitutional application.

"end result" rate relief, and the utility's right to have its financial integrity considered in defining a "just and reasonable" rate:

> "In reviewing a rate order courts must determine whether or not the *end result* of that order constitutes a reasonable balancing, *based on factual findings*, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates." 810 F.2d at 1177-78 (citing *Hope*; emphasis added).

The New Hampshire Supreme Court found *Jersey Central* "not as helpful to . . . [PSNH's] position as might appear on a first reading." App. A at 13a. It then distinguished *Jersey Central* on the basis that there, no "legislatively established policy," *i.e.*, the anti-CWIP law, existed. App. A at 14a. While highlighting a distinction without a difference—summary application of legislative as distinct from administrative policy—the New Hampshire Supreme Court did not see fit to address the critical point made by *Jersey Central*: that the Constitution requires factual balancing of the specific issues raised in a specific case, including the financial integrity of the utility. This balancing must be accomplished free of any arbitrary methodological restraints.[16]

Instead, the New Hampshire Supreme Court quoted the specious reasoning of the Pennsylvania Supreme Court, which stated:

> "In cases where the balancing of consumer interests against the interests of investors causes rates . . . which [are] insufficient to ensure the continued financial integrity of the utility, it may simply be said that the utility has encountered one of the risks that imperil any business en-

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16 The court also attempted to distinguish *Jersey Central* on the basis that in *Jersey Central* the utility was impermissibly denied a hearing. The instant situation is, however, exactly analogous because PSNH likewise has not been permitted to demonstrate on the merits why a rate that includes CWIP would not be exploitative of consumers.

> terprise, namely the risk of financial failure." *Pennsylvania Electric Co.* v. *Pennsylvania Public Utility Comm'n*, 509 Pa. 324, 331, 502 A.2d 130, 134 (1985).

This line of reasoning distorts both the language and the meaning of *Hope*, which notes that "a just and reasonable rate is one which reflects, among other things, a rate of return 'commensurate with returns on investment in other enterprises having corresponding risks.' " App. A at 10a, quoting *FPC* v. *Hope*, *supra*, 320 U.S. at 603.

In adopting this flawed reasoning the New Hampshire Supreme Court failed to note: 1) that very few other enterprises are compelled, by statute, to provide their product to all comers, on demand, at regulated prices not set by the marketplace; 2) that constructing electric generating capacity, whether nuclear or otherwise, involves hundreds of millions of dollars and takes years to accomplish; and 3) that no investors, with foreknowledge of what some state courts now say is the extent of their rights, would ever risk capital in an anti-CWIP state. This eroding approach to investor protection has been succinctly stated by the Supreme Court of Ohio: "[T]he [federal] Constitution no longer provides any special protection for the utility investor." *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, 4 Ohio St. 3d 91, 99, 447 N.E.2d 733, 740 (1983). Indeed, the Supreme Court of New Hampshire echoed these sentiments: "In the broad sweep of utility regulation and financing, fundamental changes of risk allocation are policy matters for the legislature *rather than constitutional matters for the courts*" (emphasis added). App. A at 22a.

This appeal presents many of the same questions raised in *Duquesne*, *supra*. But here, the consequence of the failure to balance the utility's loss of financial integrity is presented in its gravest form. Moreover, this appeal presents the case of a multi-billion dollar construction investment held in limbo, neither cancelled nor in service, yet just as much requiring appropriate balancing to set just and reasonable rates under the circumstances as any other utility investment governed by *Hope's* end result test of constitutionality. It is time for this

Court to reaffirm that *Hope* balancing is constitutionally required, is properly subject to judicial review, and cannot be satisfied by legislative fiat.[17]

## II. The New Hampshire Court's Dictum that PSNH Investors Had Been Compensated for Risk by An "Enhanced Rate of Return" Is Factually and Conceptually Baseless

As noted, the New Hampshire court's decision turns on its conclusion that *Hope's* constitutional mandate for a process which balances interests is satisfied by a legislative enactment, rather than by requiring an adjudicatory process of balancing on a case-specific basis. The constitutional soundness of that conclusion is the issue raised in this appeal. However, the New Hampshire decision attempts to justify that outcome in PSNH's case (and perhaps to befog the constitutional issue as well) by suggesting that despite the anti-CWIP law's specific prohibition to the contrary, PSNH investors have somehow been adequately compensated through an "enhanced rate of return" allowed in the New Hampshire rate-making process.[18] This is pure dictum, based on an incorrect reading of a PUC decision, a total absence of factual predicate, and a faulty conceptual premise.

The court asserted that PSNH had actually received such a rate of return. As the court stated:

> "Indeed, the PUC granted such an enhanced rate of return in *Re Public Service Co. of N.H.*, 65 N.H.P.U.C. 45, 48-51 (1980) . . . ." App. A at 11a.

But this seems to be a plain miscitation.[19] In the cited case, the PUC had been challenged by intervenor Legislative Utility Con-

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17 Should this Court decide to note probable jurisdiction of this appeal, PSNH respectfully submits that it would be both appropriate and of aid to the Court to schedule argument in tandem with *Duquesne Light Co.* v. *Barasch* (No. 87-1160).

18 Presumably, an "enhanced rate of return" is an additional percentage added to the rate of return for the purpose of compensating for increased risk to investors.

19 A copy of the decision is at App. J.

sumers' Council ("LUCC") for illegally including an enhanced rate of return which LUCC argued would be barred by the anti-CWIP law. The PUC wrote:

> "The commission has *not* allowed an enhanced rate of return. Seemingly, this concept is based on some misconception that the commission has found a level of return and just added some enhancing factor. *This argument is simply false.* The commission by law is bound to provide a utility the opportunity to earn not less than *a reasonable return* on the cost of property of the utility *used and useful* in the public service less accrued depreciation." 65 N.H.P.U.C. at 49 (citation omitted, emphasis added).

Indeed, the PUC has never allowed a rate of return to equity holders to be enhanced to reflect the additional risk of total loss of investment nor, of course, has it allowed *any* return on construction investment, "enhanced" or otherwise.[20]

The PUC's position in that regard was based on the conclusion that a rate of return that simply recovered CWIP in a different form would violate the anti-CWIP law. Subsequently, the New Hampshire court affirmed that conclusion in relation to recovery of the cost of cancelled plant. As the court wrote:

> "It is clear that the commission could not simply increase the rate of return for the purpose of producing the same revenue over the same period of time that might be produced if the investment were amortized as an expense. This would merely be a recovery of investment by less direct means than expense or rate base treatment." *Appeal of*

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20 The pending appeal of rates noted by the New Hampshire Supreme Court (App. A at 11a-12a) involves, *inter alia*, a *refusal* by the PUC to include *any* such enhancement of rate of return. Even were such an enhanced rate of return to be granted, this would be insufficient in view of the financial crisis of 1987 to maintain the financial integrity of the utility, hamstrung as it is, not by market risk but by its statutory obligation to invest in future sources of electricity at what the court held to be no risk whatsoever to the consumer, irrespective of the circumstances.

*Public Service Co.*, 125 N.H. 46, 55, 480 A.2d 20, 25-26 (1984).[21]

The court's effort in the present case at a makeweight to justify the absolute prohibitions of the anti-CWIP law led it to draw its conclusions about "enhanced rate of return" in the total absence of a factual record. Having asked for no specific factual findings from the PUC on this point, the court, with no support whatsoever, simply assumed that PSNH investors had been compensated for the increased risk imposed by the law. To what extent they have been compensated, how such compensation was computed, whether the return was adequate, how the investor measured his benefit, and how much of his investment was covered by such protection apparently were matters of no concern to the court.[22]

In addition to the lack of any grounding in the referenced PUC decision or in the record, the New Hampshire court's theory that an "enhanced rate of return" provided PSNH's investors with constitutionally adequate compensation is conceptually unsound, especially in light of the New Hampshire anti-CWIP law and the New Hampshire court's own previous interpretation of that law. As previously interpreted and applied by the New Hampshire court, the anti-CWIP law must be taken literally, as a complete and total bar to any compensation of or on construction investment unless and until the construc-

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21 This decision, which involved the denial of recovery of PSNH's investment in the cancelled Pilgrim II nuclear plant, established that, as a matter of statutory interpretation, the anti-CWIP law barred any recovery for cancelled plant, exactly the situation in *Duquesne*, *supra*. In the Pilgrim case, the New Hampshire Supreme Court refused to rule on the constitutionality of the statute, because of what it said was an incomplete factual record (Case No. 84-140, Order of April 3, 1984), then refused to clarify what additional facts were needed for determination (*id.*, Order of July 5, 1984, denying PSNH motion for clarification of remand).

22 The court's willingness to assume that investors had been compensated in the absence of a factual record in this case contrasts starkly with its refusal to adjudicate the constitutional issues in the absence of such a record in the Pilgrim II case, *supra*.

tion is complete and in service. *Appeal of Public Service Co.*, *supra*. No rate-making device for that purpose, whether expanded rate base, increased rate of return or additional expense provision, is permitted under the statute. *Id.*

Thus, at no time since the anti-CWIP law went into effect in 1979 have PSNH investors been compensated through rates for any part of their investment in Seabrook Station or any of the risk attendant thereto, for the simple reason that this investment could not lawfully be the subject of rate relief. It is important to recognize that this investment alone is nearly three times as large as PSNH's total investment in plant in service, the only allowable base on which rates can be made under New Hampshire law. Accordingly, if PSNH investors were ever accorded an "enhanced rate of return" to recognize construction risk, that rate could have been applied as a matter of New Hampshire law only to the far smaller investment in plant in service, rather than to the construction investment actually at risk.

The arithmetic is inescapable: unless the increment in rate of return were so great as to produce an equivalent dollar return on the far smaller base, PSNH investors simply could not have been compensated for the construction investment, and the New Hampshire court's own decision in Pilgrim II prohibited such an increment in rate of return.[23] Even so, a substantial increment in rate of return, if applied only to investment in plant in service, might do something to compensate PSNH investors for increased risk in investing in PSNH operating plant, but would do nothing to compensate them for investing in unfinished construction. To the extent the New Hampshire decision suggests otherwise, it is conceptually untenable.

The New Hampshire court's suggestion that a minor rate of return increment could adequately compensate for the risk im-

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23 Indeed, it was demonstrated below that a rate of return on existing rate base of 52.08% would have been required in order simply to support debt already incurred, together with operating expenses and construction, and to provide no new borrowing or dividends to equity investors. App. A at 6a. The New Hampshire Supreme Court does not suggest that an enhancement in rate of return of over 300% could be permissible—indeed, it would run afoul of the anti-CWIP law.

posed by the anti-CWIP law also ignores the financial environment created by the law. Concern over the law's ultimate impact caused PSNH debentureholders in the Spring of 1987 to demand yields to maturity in excess of 35%, as established in the record below. In such an environment, PSNH simply could not access financial markets to any meaningful extent. In this context, an "enhanced rate of return" on plant in service is a meaningless concept. The court's resort to "enhanced rate of return" as an offset to the anti-CWIP law also ignored its own prior precedent, ignored the statutory requirement to provide electricity that compels the construction in the first place, and ignored the utility's traditional right to receive at least repayment of prudently incurred cost. *See Mississippi River Fuel Corp.* v. *FPC*, 163 F.2d 433 (D.C. Cir. 1947).

Most significantly, the Supreme Court of New Hampshire has forgotten the constitutional touchstone of *Hope*, that it is the *resulting rate* which must be *just* and *reasonable*, not simply the particular process by which it is reached. *Hope* mandates no particular methodology, and forbids no particular process. *Hope*, *supra*, 320 U.S. at 602-03; *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 776-77. But it indubitably requires a balancing within a zone of reasonableness. *See*, *e.g.*, *Washington Gas Light Co.* v. *Baker*, 188 F.2d 11, 14-15 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).

Despite PSNH's argument that it was entitled to rate relief to maintain its financial integrity, unless that rate became exploitative of consumers, as held by the *Jersey Central* court, the New Hampshire Supreme Court chose to ignore the argument entirely. By so doing, it ruled, in effect, that the New Hampshire legislature could constitutionally determine, in advance, that any payment for current construction, prior to its placement in service, is *per se* exploitative.

For over eight years, PSNH tried to "go it alone," without ratepayer support—to abide by the will of the legislature in mandating that its ratepayers pay later, rather than currently, for the generating capacity necessary to meet the obligations that are imposed on the utility by law. When that effort failed,

through no fault of PSNH, the Supreme Court of New Hampshire disparaged PSNH's attempt to obtain partial ratepayer sharing of costs as an attempted "bailout." But what in fact that court has done in the name of risk allocation is simply to say that the New Hampshire legislature can permissibly decree that there be no rate support of investment except for plant in service, *i.e.*, plant "used and useful." This elevates the "used and useful" doctrine above the *Hope* balancing test, just as the Supreme Court of Pennsylvania has expressly done in *Duquesne* v. *Barasch*.

## CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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March 30, 1988

# APPENDICES

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## APPENDIX A

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 4:00 P.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Utilities Commission
No. 87-311

PETITION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
(New Hampshire Public Utilities Commission)

January 26, 1988

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*Stephen E. Merrill*, attorney general (*Mr. Merrill* and *Larry M. Smukler*, assistant attorney general, on the brief, and *Mr. Smukler* orally), for the State.

*Michael W. Holmes* and *Joseph W. Rogers*, of Concord (*Mr. Holmes* and *Mr. Rogers* on the brief, and *Mr. Holmes* orally), for the Office of the Consumer Advocate.

*Hinkley & Hahn*, of Manchester (*Robert C. Hinkley & a.* on the brief, and *Mr. Hinkley* orally), for the Campaign for Ratepayers' Rights.

*Michael B. King*, of Portsmouth, by brief for Mary P. Chambers, House Democratic Leader, as amicus curiae.

BATCHELDER, J. This interlocutory transfer, filed by the New Hampshire Public Utilities Commission (PUC or commission) pursuant to RSA 365:20, raises the issue of the constitutionality of applying RSA 378:30-a to the fixing of electric utility rates in an emergency rate proceeding. The commission reserved, certified, and transferred three questions of law which are set forth in the discussion below. We answer all three questions in the negative, and hold that RSA 378:30-a is constitutional under the State and Federal Constitutions on the facts presented to us in this transfer.

I. *Facts and Procedural History*

This interlocutory transfer is viewed, and its issues decided, against a factual background which must be unique in the annals of public utility financing. Public Service Company of New Hampshire (PSNH or company) is the owner of an approximately 35% interest in the Seabrook Unit I nuclear generating station, which for practical purposes had its construction phase completed on or about October 31, 1986, at a cost to PSNH of $1,770,617,913. The total project cost, we were told at argument, has, since the completion date, been increasing at the rate of $50 million per month. Because its final licensing proceeding is yet to be complete, the plant is producing neither electricity nor income, and the likelihood and timing of either event are matters of speculation and uncertainty.

To ameliorate the costly effects of these circumstances, PSNH, on August 5, 1987, petitioned the commission to "Alter Existing Rates on Account of Emergency Circumstances," docketed as DR 87-151 (application). PSNH requested an emergency rate surcharge which would produce approximately $70.98 million in additional annual revenues, an increase of 15% based on sales for the twelve months ended December 31, 1986. In its application, PSNH proposed that the commission allow the company a special emergency rate base increment of $464.5 million, representing approximately 27% of PSNH's to-

tal investment of $1.77 billion in Unit I. PSNH proposed also that the commission allow a special emergency rate of return of 15.28%, the company's cost of debt capital as determined by the commission in PSNH's most recent rate case, DR 86-122. *See* Report and Order No. 18,726 (June 1987). In order to expedite consideration and determination of this application, PSNH submitted, on the same date, a request that the commission reserve, certify, and transfer the following question to this court in accordance with RSA 365:20:

> "Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> (1) Its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
>
> (2) Its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and
>
> (3) Accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity.
>
> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called 'anti-CWIP' statute?"

The commission anticipated that answers to the question set forth in the requested transfer were likely to control the outcome of PSNH's request for emergency relief in DR 87-151 and granted PSNH's request without holding a hearing. Furthermore, without making specific findings of fact, the PUC provided this court with basic facts that the commission accepted for purposes of this transfer. The commission also added a second question which addressed the constitutionality of applying RSA 378:30-a:

> "Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress [(CWIP)] on a con-

> struction project in rate base before said construction project is actually providing service to cust mers, notwithstanding the requirements of RSA 378:30-a?"

Following the filing of the interlocutory transfer, a prehearing evaluation conference was held before Howard J. Zibel, Esquire, Deputy Clerk of this court, for the Supreme Court on August 25, 1987, the primary focus of which was consideration of the adequacy of the factual record. As a result of that conference, we deferred acceptance of the transfer in an order dated September 2, 1987, until the commission conducted hearings and made findings of fact sufficient for "informed consideration of [the] constitutional issues." *Appeal of Public Serv. Co. of N.H.*, 125 N.H. 46, 48, 480 A.2d 20, 21 (1984). Specifically, this court requested the commission to make findings of fact on the following issues:

> "a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.
>
> b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the amounts of the company's investment prior to that date, between that date and the effective date of § 30-a, and thereafter."

The commission held hearings on the proposed issues on September 16, 17, and 21, and on October 16, 1987, submitted to this court a record reflecting findings of fact on both issues. *See* Report and Sixth Supplemental Order No. 18,873. A supplemental report and record was transferred to this court on November 2. Report and Ninth Supplemental Order No. 18,890.

Under issue a., the PUC found with respect to the "claimed need" of PSNH that it was unlikely that PSNH would be in a position to meet its cash obligations as they became due: namely, interest and principal payments on debts, expansion of

service to customers, and fuel expenses, payroll, and other related expenses. The commission examined two traditional sources of funds for PSNH: external financing and rates. The PUC found that financial markets are unwilling to provide additional new funds for PSNH due to investor perceptions of high risk. The commission noted, however, that there is the possibility that existing debt could be restructured, but it is improbable that this would occur before January, 1988. External financing, therefore, is not a dependable alternative for restoring PSNH's financial integrity.

The other source of funds for PSNH is rates. Before considering the variables involved in an actual rate increase, the commission examined two rate-related alternatives. The commission found that PSNH could delay a refund owed to ratepayers ordered by the PUC in a previous docket. This would provide approximately $21 million, and would permit PSNH to meet its cash obligations into 1988. However, PSNH did not request authorization to delay the refunds, and the commission did not intend to authorize such a delay *sua sponte*.

The second alternative dealt with the possibility of PSNH's successfully appealing the prior rate order in DR 86-122. However, the PUC determined that even if PSNH were successful, the maximum amount PSNH could add to its revenues would not meet its claimed revenue needs.

The most realistic alternative, according to the commission, is additional cash through a rate increase. In order to justify this, one or more of three variables in the formula expressing the traditional ratemaking methodology might be adjusted to allow higher revenue to be raised by rates charged to consumers. *See Appeal of Conservation Law Foundation*, 127 N.H. 606, 640, 507 A.2d 652, 675 (1986); *Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 49, 480 A.2d at 22. The first is the value of the rate base, which could be increased by including a portion of PSNH's investment in Seabrook. The commission found this approach specifically precluded by RSA 378:30-a. *See Appeal of Public Serv. Co. of N.H.*, *supra* at 54-55, 480 A.2d at 25.

The second variable is the expense component of the ratemaking formula, which could be adjusted upward to cover the cost of servicing debt or equity capitalization not reflected in the rate base. However, the commission concluded that this would result in covering capitalization related to PSNH's investment in Seabrook. Again, the commission believed that this was prohibited by § 30-a.

The third variable subject to adjustment is the rate of return on rate base. According to the testimony, the commission found that modifying this variable to meet actual revenue need would require a return on equity of 52.08% (34% after tax adjustments) to achieve the requested revenue level. But such rates would far exceed traditional rates of return, and the commission was concerned that authorizing them would merely circumvent the restrictions of § 30-a. *See Appeal of Public Serv. Co. of N.H.*, *supra* at 55, 480 A.2d at 26 (commission may not adjust rate of return to permit recovery of lost investment, as distinguished from reflecting risk of such loss in setting rates).

The PUC found, in conclusion, that PSNH needs additional revenues from a rate increase in order to meet its cash obligations. However, a sufficient adjustment of any one of the variables comprised by the traditional ratemaking formula would, in the opinion of the commission, violate § 30-a.

Under issue b., concerning the historical levels of investment by PSNH in Seabrook at various times related to the effective date of § 30-a, the commission constructed a table reflecting such levels of investment, which was supplemented later by a revised table. Although PSNH's ownership percentage in Seabrook Unit I has decreased from 50% to 35.56942% since the enactment of RSA 378:30-a, the commission noted that PSNH's cash investment did not decline and did not, therefore, adjust the investment to reflect the change. The commission included as PSNH's cash investment the cost of procuring and constructing Seabrook Unit I, indirect costs, common plant, nuclear fuel, and land. The common plant component of the investment consists of the facilities designed to serve both Unit I and Unit II. The first table displayed the total investment in Unit I without deducting any portion of the common plant,

since the PUC at that time lacked the appropriate figures. The second table, provided in the supplemental report and record, showed PSNH's investment in Unit I, including only 50% of the common plant. While the PUC found it most reasonable for purposes of this case to split the common plant evenly between the two units, it noted that it made no finding regarding the proper method of allocating plant for purposes of rate base once one plant of a two-plant project is cancelled and the other is operating. The following table, which embodies the final results provided in the supplemental report and record, sets forth the commission's findings on PSNH's investment in Unit I:

| *Date* | *PSNH Investment in Unit I* |
|---|---|
| 04/30/77 | 65,003,098 |
| 05/31/78 | 152,376,338 |
| 04/30/79 | 214,210,548 |
| 12/31/79 | 287,920,316 |
| 12/31/80 | 408,505,079 |
| 12/31/81 | 445,555,835 |
| 12/31/82 | 607,373,109 |
| 12/31/83 | 854,348,392 |
| 12/31/84 | 1,084,696,629 |
| 12/31/85 | 1,347,895,265 |
| 12/31/86 | 1,624,262,219 |
| 12/31/87 | 1,766,468,881 |

Commissioner Bisson concurred in the commission's report, but submitted separate tables on the investment levels which excluded PSNH's investment in the plant's education center and the termination yard, which is the main switching yard for the station, because those items have been included in the company's rate base for several years.

On November 4, 1987, after the filing of the commission's supplemental report, we accepted the interlocutory transfer and ordered briefing. On November 5, 1987, the PUC filed a request to address the following third question, which we accepted:

> "Does the proper interpretation of RSA 378:9, which provides that the commission may 'temporarily . . . alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto . . .' when it finds that an emergency exists, allow the commission, upon the finding that an emergency exists, to depart from traditional ratemaking methods to establish temporarily rates which will allow a utility to meet cash flow requirements, notwithstanding the provisions of RSA 378:30-a?"

Oral arguments were held on December 15, 1987, during which the parties addressed the transferred questions, summarized as follows: (1) the right of PSNH to obtain a hearing before the PUC to establish a level of rates necessary to restore PSNH's financial integrity, notwithstanding the "anti-CWIP" statute, RSA 378:30-a; (2) the constitutionality of RSA 378:30-a under the circumstances of this case; and (3) the authority of the PUC to set emergency rates pursuant to RSA 378:9 under the circumstances of this case, notwithstanding RSA 378:30-a.

II. *Constitutionality of the Statute*

It should be noted at the outset that PSNH does not make a facial attack on the anti-CWIP statute and claim its unconstitutionality *per se*, but bases its claim on the particular facts giving rise to the transferred questions in this case. In other words, PSNH claims unconstitutionality as the statute is applied to it in the company's present circumstances. Hence, the focus of our inquiry can be considerably narrowed by recognizing the obvious relationship between transferred questions 1 and 2. Although initially PSNH sought only the right to a hearing before the PUC, the commission concluded that the company would not be entitled to the revenue increase in the amount requested unless RSA 378:30-a was held invalid. (The commission, of course, did not make any finding at this stage of the proceeding as to whether the standard of "just and reasonable" would permit any increase in rates at this time.) Indeed, PSNH recognized this in framing question 1, as it sought a hearing and rate in-

crease "notwithstanding RSA 378:30-a." It is clear then that question 1 is subsumed by question 2, and both stand or fall together.

The text of the statute under examination provides:

> "378:30-a *Public Utility Rate Base; Exclusions.* Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers."

RSA 378:30-a. Both the concept of CWIP and the interpretation of the broad prohibitory language of this section have been fully examined by this court in *Appeal of Public Serv. Co. of N.H. supra*, and need not be repeated here. Suffice it to say that the anti-CWIP law simply forbids return on or recovery of investments through utility rates before the project is completed and providing service to customers. *Appeal of Public Serv. Co. of N.H., supra* at 54-55, 480 A.2d at 25. One response to this mandate is known as an allowance for funds used during construction (AFUDC), which reflects the cost of delay in earning a return when an investment ultimately is placed in the rate base. *See Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 50, 480 A.2d at 22.

We do not, however, rely on AFUDC in assessing the constitutionality of RSA 378:30-a under the fifth and fourteenth amendments to the United States Constitution and part I, article 12 of the New Hampshire Constitution. We look instead to the constitutional limitations on rate regulation set forth by the United States Supreme Court in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *Hope* represents the culmination of decades of judicial inquiry into the proper

constitutional restraints on the process of public utility rate regulation and the focus of substantive judicial review of ratemaking. *See generally* Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. Rev. 65 (1985). The opinion in *Hope* establishes a limited and simplified constitutional yardstick. Briefly, the constitution requires only that the regulatory body engage in a rational process of balancing consumer and investor interests to produce a rate that is just and reasonable. 320 U.S. at 602, 603. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968) (commission to give reasoned consideration to investor interests as well as provide protection to the relevant public interests); *Market Street R. Co. v. Comm'n*, 324 U.S. 548, 563 (1945) (investor interests considered in light of diminished service to the public); *Appeal of Conservation Law Foundation*, 127 N.H. at 636, 507 A.2d at 672 (object of process is to strike a fair balance between customer and investor interests); *Pennsylvania Elec. v. Pennsylvania Pub. Util.*, 502 A.2d 130, 133 (Pa. 1985) (*Hope* requires only that regulatory agency balance competing consumer and investor interests to determine just and reasonable rates). A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation. *See, e.g., Appeal of Conservation Law Foundation*, *supra* at 635, 507 A.2d at 672; *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 342, 402 A.2d 626, 632 (1979); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951). With regard to investment interests, a just and reasonable rate is one which reflects, among other things, a rate of return "commensurate with returns on investments in other enterprises having corresponding risks." *Power Comm'n v. Hope Gas Co.*, *supra* at 603; *Company v. State*, 95 N.H. 353, 361, 64 A.2d 9, 16 (1949).

*Hope*, however, is apposite to the question before us, not for what it holds that the constitution promises, but rather for what it explains that the constitution declines to guarantee. The import of *Hope* is that the constitution is only concerned with the

end result of a rate order; *i.e.*, that it be just and reasonable. Under *Hope*, the particular ratemaking methodology employed by the regulatory agency is, for the most part, constitutionally irrelevant. *See Power Comm'n v. Hope Gas Co.*, 320 U.S. at 602 (commission not bound to any single ratemaking formula). The only limitation on the methodology is that it produce neither confiscatory nor exploitative rates.

The anti-CWIP statute affects ratemaking methodology by assigning the cost of carrying investment in CWIP, and by allocating the risk of direct loss that may result if the construction never becomes productive, to investors rather than consumers. *See Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 50, 480 A.2d at 22. As noted above, it forbids the commission from setting utility rates to be paid by consumers on the basis of investment in construction prior to commencement of a project's operation. *Id.* at 54-55, 480 A.2d at 25. Thus, the construction risks of such projects are not to be passed on to ratepayers. Instead, these risks are, by legislative mandate, to be borne by investors. The constitutional consequence of this type of risk allocation is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them.

The PUC has already addressed the effect of this risk allocation. In *Re Public Serv. Co. of N.H.*, 64 N.H.P.U.C. 295, 304 (1979), the PUC acknowledged that in making rates, its discretion is expressly limited by the language of the anti-CWIP statute. Additionally, the commission correctly maintained that it has a "duty to balance the interests of the investor and the consumer through the establishment of just and reasonable rates, the 'touchstone' for utility regulation." *Id.* The commission concluded that exclusion of CWIP from PSNH's rate base had the effect of substantially increasing investor risk. *Id.* at 306. The PUC determined that the overall rate of return on PSNH's rate base, even though that rate base no longer includes CWIP, may have to be enhanced to reflect the additional risk to investors created by anti-CWIP. *Id.* Indeed, the PUC granted such an enhanced rate of return in *Re Public Serv. Co. of N.H.*, 65 N.H.P.U.C. 45, 48-51 (1980), and since that time the company

has filed one appeal challenging the rates or rate of return allowed by the commission, an appeal which is currently awaiting argument before this court.

The company concedes that the anti-CWIP law can be constitutionally applied in some circumstances. Furthermore, the company does not claim that no rate could ever be commensurate with the risk imposed by § 30-a. Moreover, as revealed by the PUC's treatment of § 30-a in its 1979 and 1980 orders discussed above, there is no basis for claiming that the timing of the enactment of § 30-a precludes constitutional application. Throughout the life of the Seabrook project, with the exception of the limited period between PUC order No. 13,162 (May 25, 1978) which included CWIP in the company's rate base, *see LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 402 A.2d 626 (upholding order as a matter of policy), and the effective date of § 30-a (May 7, 1979), CWIP has been excluded from the rate base. This is not a situation, for example, in which the anti-CWIP law was enacted on the eve of the loss itself, so that enforcing it would preclude both a return commensurate with risk and a recoupment of the loss.

The essence of the company's position in this interlocutory transfer is not, therefore, the company's desire for the setting of a just and reasonable rate to compensate investors for the risks they have assumed. PSNH seeks, rather, nothing less than allocation of the risk back to the ratepayers now that the risk of inoperative investment has materialized. Section 30-a injected into the investment assessment the risk of delay of return, not only during construction, but also when construction is completed, possibly forever. That is, failure to recover the cost of a completed but non-functioning plant is one of the risks that a higher rate of return compensates the investors for bearing. That risk has materialized; and now, by asking that CWIP be included in rate base, the company is asking to shift the risk back to the ratepayer. The company and its investors have received compensation for the risks they have assumed through an enhanced rate of return, and here seek relief from those risks now that they have come to pass. Essentially, the company seeks a bailout. With or without anti-CWIP, the State and Fed-

eral Constitutions do not allow the company to have it both ways. In the words of the Pennsylvania Supreme Court:

> "In cases where the balancing of consumer interests against the interests of investors causes rates . . . which [are] insufficient to ensure the continued financial integrity of the utility, it may simply be said that the utility has encountered one of the risks that imperil any business enterprise, namely the risk of financial failure."

*Pennsylvania Elec. v. Pennsylvania Pub. Util.*, 502 A.2d at 134.

Although *Hope* does guarantee a return proportionate to the risk, PSNH is wrong in contending that *Hope* and its progeny guarantee to a utility a rate which assures its financial integrity. Based on the clear indications that the Hope Natural Gas Company was financially sound and well-managed, the *Hope* court enumerated as a consideration for the regulatory agency the impact that a particular rate would have on the financial integrity of the company. *Power Comm'n v. Hope Gas Co.*, 320 U.S. at 603. But *Hope* made no promises with respect to guaranteeing net revenues, *id.*, and later cases reiterated *Hope*'s statement that regulation does not insure profits. *See, e.g., Market Street R. Co. v. Comm'n*, 324 U.S. at 566. The Supreme Court has expressly held that it is not the mandate of the constitution to rejuvenate the value of the investments of a company whose "zenith of opportunity" has been eclipsed by the operation of economic forces. *Id.* at 554; *cf. Appeal of Conservation Law Foundation*, 127 N.H. at 636, 507 A.2d at 672. Providing a return sufficient to maintain the financial integrity of a sound company is one thing; restoring the financial integrity is another.

At this juncture, we point out that a case much relied upon in the brief of PSNH, *Jersey Central Power & Light Co. v. Federal Energy Regulatory Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987) (*Jersey Central*), is not as helpful to the company's position as might appear on a first reading. In *Jersey Central*, the utility sought relief from a Federal Energy Regulatory Commission (FERC) order modifying the utility's proposed rate schedule. The utility charged "that it alleged facts which, if proven,

show that the reduced rates are confiscatory and violate its statutory and constitutional rights as defined by the Supreme Court in [*Hope*]." 810 F.2d at 1169. Several factors distinguish *Jersey Central* from this interlocutory transfer. First, the utility in *Jersey Central* was denied a hearing, resulting in its rate schedule being reduced summarily. Second, although the utility claimed entitlement to relief under *Hope* because of its financial precariousness resulting from its lost $397 million investment in a cancelled nuclear generating station at Forked River, New Jersey, there was no legislatively established policy, to be considered in any *Hope* analysis, relating to exclusion from rate base of CWIP. Finally, in *Jersey Central*, FERC denied a hearing to the utility despite the utility's claim that the commission would neither include the lost construction investment in the rate base, nor allow the utility a rate of return consistent with placing the risk of loss entirely on the utility and its investors. *Id.* at 1171. Thus, where FERC was alleged to have denied both rate base treatment and an adequate return, PSNH here demands to be given both.

*Jersey Central*'s teachings are simple. First, the utility was impermissibly denied a hearing to make its case and to distinguish its situation from other instances in which FERC had excluded unamortized investments in cancelled plants from rate base, upon which FERC based its precedential foundation for summarily disposing of Jersey Central's request. *See* 810 F.2d at 1172. The second teaching of *Jersey Central* is that "the end result of commission rate orders must be 'just and reasonable' to both consumers and investors, and that, in achieving this balance, the commission must consider the impact of its rate orders on the financial integrity of the utility." *Id. Jersey Central* does not stand for the proposition, nor does PSNH argue, that a publicly regulated utility has a constitutional right not to go bankrupt. The case does not deal in any way with the public policy of anti-CWIP legislation. *Jersey Central* is not dispositive of this case.

At a time when Jersey Central Power & Light, and other utility companies in states where no anti-CWIP statutes were in force, determined that market forces required them to abandon

future construction of nuclear generating plants already under construction, PSNH in the face of an unchallenged anti-CWIP statute determined to proceed with construction. The risk of doing so was measured and calculated closely by the marketplace and investors, and was reflected in the interest rates charged on the company's bonds and notes and the market prices of its equity shares. The risk of failure was present in this enterprise as with any other business venture and was available for assessment by those who lent money and those who bought shares.

In enacting the anti-CWIP law, the legislature recognized that the rule may cause utilities to experience cash flow or other financial difficulties. *See* N.H.S. Jour. 604-15 (1979). It was fully cognizant that the CWIP prohibition would have the effect of allocating the direct consequences of the risk of nonoperation to investors, rather than ratepayers. Report of the Science and Technology Committee, N.H.H.R. Jour. 626-27 (1977). The legislature was aware that this risk allocation is ultimately more expensive for consumers if the project succeeds. *See generally Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 50, 480 A.2d at 22 (describing allowance for funds used during construction (AFUDC) method of cost recovery). The anti-CWIP law, however, protects consumers against the direct consequences of a failed investment and places the onus on the financial markets to assess carefully investment decisions. Report of the Science and Technology Committee *supra*.

In making this determination, the legislature effectuated a return to the traditional interpretation of the used and useful principle. *See LUCC v. Public Serv. Co. of N.H.*, 119 N.H. at 343-44, 402 A.2d at 634 (permitting commission discretion in applying used and useful so as to include CWIP in rate base). This principle has been a long-standing tenet of New Hampshire public utilities law in determining whether a utility's property is included in or excluded from its rate base for ratemaking purposes. *Appeal of Conservation Law Foundation*, 127 N.H. at 637, 507 A.2d at 673. Indeed, the principle enjoyed constitutional status until the *Hope* decision. *Compare Smyth v. Ames*, 169 U.S. 466 (1898) *with Power Comm'n v. Hope Gas Co.*, 320

U.S. 591. Although the used and useful standard is no longer constitutionally mandated after *Hope*, it remains a constitutionally permissible legislative articulation of the perceived interests of consumers in paying directly only for the costs of a project actually in use and providing service to the public. *See* Drobak, 65 B.U.L. Rev. at 96 (advocating judicial deference to legislative judgment as to meaning of public interest).

We answer questions 1 and 2 in the negative.

III. *Retrospective Laws*

PSNH argues in the alternative that, if RSA 378:30-a is constitutional under the circumstances of this rate proceeding, then the statute, nonetheless, cannot operate restrospectively to bar recovery of or on the investment made prior to its enactment date, May 7, 1979. The company's claim is based on the New Hampshire Constitution, part I, article 23, which prohibits retrospective laws:

> "[Retrospective Laws Prohibited.] Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made either for the decision of civil causes, or the punishment of crimes."

The underlying purpose of this article is "to prevent the legislature from interfering with the expectations of persons as to the legal significance of their actions taken prior to the enactment of a law." *State v. Vashaw*, 113 N.H. 636, 638, 312 A.2d 692, 693 (1973).

A retrospective law has been defined in this manner:

> "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." 16(A) Am. Jur. 2d *Constitutional Law* § 661 (1979).

Vested rights have been described as follows:

> "[R]ights which have so completely and definitely accrued to or settled in a person that they are not subject to be de-

> feated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare." BLACK'S LAW DICTIONARY 1402 (5th ed. 1979).

Any vested right which the company had when it commenced construction was a right to the constitutional guarantees of *Hope*; namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary.

While the company accurately presents the legal rules with respect to retrospective laws, it fails to explain how these rules apply to its present condition. A review of the records pertaining to the enactment and the application of RSA 378:30-a reveals that it was applied only prospectively as of May 7, 1979.

In *Re Public Serv. Co. of N.H.*, 64 N.H.P.U.C. 295, the PUC reevaluated PSNH's rates after the enactment of RSA 378:30-a. There the commission stated "since the commission is not applying RSA 378:30-a as to any rate charge rendered to consumers prior to May 7, 1979, the commission is not altering any [legal provisions for the treatment or consequences of] events prior to May 7, 1979. The commission is thus applying RSA 378:30-a to events or rates after May 7, 1979, and thereby prospectively." *Id.* at 302. In other words, PSNH was allowed to keep revenue earned from a rate base which included

the value of CWIP. The commission originally included $111,258,428 as the value of CWIP in the rate base on May 25, 1978. *See Re Public Serv. Co. of N.H.*, 63 N.H.P.U.C. 127, 149 (1978). That value represented the accumulated costs at April 30, 1977 of four major projects: Seabrook I and II, Wyman IV, Millstone III and Pilgrim II. 63 N.H.P.U.C. at 138. The legislature prohibited the inclusion of CWIP by passing RSA 378:30-a a year later, in May 1979. Although the commission ordered PSNH to refund to the customers CWIP charges in *Re Public Serv. Co. of N.H.*, 65 N.H.P.U.C. 162 (1980), it limited the order to CWIP charges included in the rate from May 7, 1979, to December 28, 1979 (May 7 is the effective date of RSA 378:30-a and December 28 is the date of the emergency rate order which reflected exclusion of CWIP from the rate base). The commission noted that "[a]ny rates collected prior to the enactment of RSA 378:30(-a) (sic) are not at issue." *Id.* at 165. Thus, the rates collected after the order issued on May 25, 1978 in *Re Public Serv. Co. of N.H.*, 63 N.H.P.U.C. 127, and before the enactment date of RSA 378:30-a were left untouched.

Besides preventing the application of RSA 378:30-a to rates prior to May 7, 1979, the company asserts no other grounds for raising the issue of retrospective laws. As the post-enactment commission orders reveal, the company's argument against such application must fail.

IV. *Emergency Ratemaking*

In the third question we are asked to determine whether the mandate to exclude CWIP from a public utility's rate base under RSA 378:30-a restricts the commission's discretion to alter rates under emergency circumstances, as authorized by RSA 378:9, the emergency rate statute. Simply stated, is the commission statutorily authorized to ignore the restriction imposed by RSA 378:30-a when it has determined that an emergency exists for a public utility?

To answer this question we apply basic rules of statutory interpretation. When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not

contradict each other, *State v. Woodman*, 114 N.H. 497, 500, 323 A.2d 921, 923-24 (1974), and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. *McGrath v. City of Manchester*, 119 N.H. 109, 112, 398 A.2d 842, 844 (1979); *see also Swiezynski v. Civiello*, 126 N.H. 142, 148, 489 A.2d 634, 639 (1985) ("Where reasonably possible, statutes should be construed as consistent with each other."). Legislative history serves as a valuable aid in ascertaining the meaning of statutes, *Doe v. State*, 114 N.H. 714, 717, 328 A.2d 784, 786 (1974), and we resort to such aid where the statutes are ambiguous, *Appeal of Public Serv. Co.*, 125 N.H. at 52, 480 A.2d at 24.

As the commission noted in its order, PSNH could not receive an increase under the emergency statute without ignoring traditional ratemaking methodologies. *See* Report and Sixth Supplemental Order No. 18,873, at 14 n.2. Indeed, the parties agree that in the present case the PUC is not empowered to grant emergency relief simply to increase cash-flow without regard to the source of the cash shortage. In light of the source of the emergency, cash-flow ratemaking would simply be an effort to accomplish indirectly what the terms of the anti-CWIP law prohibit.

Nonetheless, the company argues that the emergency rate statute should be construed to override RSA 378:30-a when the source of the financial crisis is caused by the anti-CWIP law. To read the statutes differently, counsel for PSNH explains, would be to produce an inconsistent result; namely, preventing the commission from performing its constitutional duties to address the claims of unjust and unreasonable rates caused by the anti-CWIP law. Counsel suggests, therefore, that the balancing discretion is broader under the emergency rate statute.

To the extent that this argument assumes the unconstitutionality of applying RSA 378:30-a in the present circumstances, we have answered it in part II above. To the extent that it raises a new issue of statutory interpretation, we begin our inquiry with the examination of statutory language. *In re Robyn W.*, 124 N.H. 377, 379, 469 A.2d 1351, 1352 (1983). RSA 378:9 provides:

> "Emergency. Whenever the commission shall be of the opinion that an emergency exists, it may authorize any public utility temporarily to alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto."

The statute grants the commission broad discretionary powers. The commission may determine whether a state of emergency exists for a public utility or the public, increase or decrease rates, and disregard existing rules and regulations without requiring the customary complement of formal hearings and investigations. The statute does not define "emergency," but this court, in an earlier case, determined that emergency is synonymous with crisis and that "the Legislature . . . intended . . . to vest in the commission as a fact finding body wide discretionary powers to decide whether a crisis is of sufficient severity to warrant relief and if so the extent of relief." *Petition of Public Service Co.*, 97 N.H. 549, 550, 84 A.2d 177, 178 (1951).

The anti-CWIP statute, on the other hand, restricts the commission's discretionary powers in the ratemaking process. We examined the language of the statute in *Appeal of Public Serv. Co.*, 125 N.H. 46, 480 A.2d 20, and noted that each of the three sentences restricts the commission's discretion in some way. In brief, the first sentence prohibits the PUC from including CWIP costs in rates in "any manner;" the second sentence states explicitly that "at no time" may the commission base the rates on such costs while the construction work is incomplete; and the third sentence explains in particular what types of cost associated with CWIP may not be considered for ratemaking purposes until the project is actually providing service to customers. Read together, these provisions prohibit any rate to be based on investment in construction or plant that has never been placed in operation.

The one statute grants the commission general ratemaking powers under emergencies, and the other, enacted after the first, restricts the commission's discretion when determining rates. "When a conflict exists between two statutes, the later

statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152, 383 A.2d 1122, 1124 (1978). RSA 378:30-a was enacted after the emergency statute. The anti-CWIP statute is unconditional in its prohibition, and makes no exceptions for emergencies.

Our review of the legislative history leads to a similar conclusion—the anti-CWIP law applies to emergency circumstances. Although the legislative journals are silent with respect to the objective and scope of Laws 1913, 145:12, the predecessor of RSA 378:9, they are not silent with respect to RSA 378:30-a. Members of the Senate proposed amendments to the anti-CWIP bill (HB 155) during the April 1979 session. *See, e.g.*, N.H.S. Jour. 604-05 (1979). One amendment would have conditioned the deletion of CWIP charges so that it would occur when the New Hampshire public utilities' ownership in Seabrook fell under 50%. Another amendment would have provided protection to New Hampshire public utilities' ownership by granting the PUC discretion to include CWIP when necessary to protect the 50% ownership. Despite the concerns expressed by the proposing members of the Senate with respect to the financial integrity of New Hampshire's public utilities, particularly, PSNH, the amendments failed. No mention was made of using the emergency statute as an alternative. The discussions had by the members of the Senate indicate that there was no intention to provide an exception to the anti-CWIP law.

The company makes an erroneous assumption that the anti-CWIP statute has caused the existing rates to become unjust and unreasonable rates. We have concluded in response to questions 1 and 2 that the application of that statute to PSNH's present ratemaking proceeding is constitutional, which is to say that the anti-CWIP statute is also constitutional under emergency circumstances. Therefore, our interpretation of RSA 378:30-a and RSA 378:9 does not produce an illogical result, but rather, a consistent result which effectuates the legislative purpose of the statute.

V. *Conclusion*

In conclusion, we determine that the application of the anti-CWIP law to the facts presented to us by the company in this interlocutory transfer would not violate the provisions of either the New Hampshire or the United States Constitution. The same right to rates that the company had before anti-CWIP are the same rights that it has today. The anti-CWIP statute is a re-affirmation of the "used and useful" concept standing for the proposition that the direct consequences of investment risk for new plants must be borne by investors, not ratepayers. In the broad sweep of utility regulation and financing, fundamental changes in risk allocation are policy matters for the legislature rather than constitutional matters for the courts.

All concurred.

## APPENDIX B

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Appearances: Martin L. Gross, Esq. of Sulloway, Hollis & Soden, Thomas R. Jones, Esq. of Cahill, Gordon & Reindel and D. Pierre G. Cameron, Jr. Esq. for Public Service Company of New Hampshire; Michael Holmes, Esq. and Joseph W. Rodgers, Esq. for the Consumer Advocate; Robert C. Hinkley, Esq. and Vaughn Tamzarian, Esq. of Hinkley and Hahn for the Campaign for Ratepayers Rights; Ian G. Wilson for the Business and Industry Association; Mark J. Bennett, Esq. for the City of Nashua, Town of Rye, and City of Manchester; Jeffrey J. Zellers, Esq. of Hall, Morse, Gallagher & Anderson for the New Hampshire Electric Cooperative, Inc.; Martin C. Rothfelder, Esq. for the commission staff and the commission.

*Report*

On August 5, 1987 Public Service Company of New Hampshire (PSNH) filed a petition to alter existing rates on account of emergency circumstances to produce an overall estimated increase in annual revenues of $70,973,279, an increase of 15% based on sales for the 12 months ended December 31, 1986. The PSNH petition contended that absent the requested relief it would have no choice but to seek protection from creditors under federal bankruptcy laws. It, therefore, requested the commission to transfer to the New Hampshire Supreme Court a question regarding the rights of a public utility in such circumstances, notwithstanding the restrictions of RSA 378:30-a:

> Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> (1) its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
>
> (2) its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and
>
> (3) accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity,
>
> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called "anti-CWIP" statute?

The commission granted the PSNH request[1] and in addition, transferred the following two questions:[2]

> Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, regardless of RSA 378:30-a?
>
> Does the proper interpretation of RSA 378:9, which provides that the commission may "temporarily . . . alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto . . ." when it finds that an emergency exists, allow the commis-

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1 Report Regarding Request for Transfer, Order No. 18,788 and Interlocutory Transfer Without Ruling (August 11, 1987).

2 *Id.*; and Tenth Supplemental Order No. 18,901 (November 5, 1987).

sion, upon the finding that an emergency exists, to depart from traditional ratemaking methods to establish temporarily rates which will allow a utility to meet cash flow requirements, notwithstanding the provisions of RSA 378:30-a?

The court deferred accepting the transferred questions until the commission made findings of basic facts addressing the following issues:

a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.

b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the amounts of the company's investment prior to that date, between that date and the effective date of § [378:] 30-a, and thereafter.

The commission developed findings of fact related to the transferred questions for the court,[3] held numerous hearings, and heard oral argument on December 31, 1987. At the oral argument, PSNH supported granting the requested increase. The consumer advocate and CRR opposed the increase. The other parties in the case[4] did not appear at the argument. The com-

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3 Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order and Sixth Supplemental Order No. 18,873 (October 14, 1987); and Supplemental Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order and Ninth Supplemental Order No. 18,890 (November 2, 1987).

4 The other parties are: The Business and Industry Association of New Hampshire, the Department of Defense, the New Hampshire Electric Cooperative, the City of Nashua, the Town of Rye, and the City of Manchester.

mission also notes that it issued orders dealing with numerous other motions and procedural concerns during the case.[5]

Evidence heard after said findings of fact were forwarded to the supreme court showed that PSNH did not meet and was not meeting its cash obligations. Based on these findings the commission concludes that a financial emergency did and does exist.

On January 26, 1988, the supreme court[6] issued an opinion addressing the three questions transferred to the court. All were answered in the negative. Under that supreme court opinion and the findings of fact made in this case, the commission lacks authority to grant PSNH a rate increase. Thus, pursuant to state law, the commission finds that it must deny PSNH's request for a rate increase.

All other motions and requests before the commission that have not been previously ruled on are hereby denied.

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5 Order No. 18,801 (August 25, 1987); Report on Prehearing Conference of August 25, 1987 and Supplemental Order No. 18,805 (August 31, 1987); Supplemental Order No. 18,815 (September 31, 1987); Second Supplemental Order No. 18,812 (September 3, 1987); Report Regarding Consumer Advocate's Motion For Rehearing and Third Supplemental Order No. 18,827 (September 14, 1987); Report Regarding Consumer Advocate's Motion to Transfer and Fourth Supplemental Order No. 18,828 (September 14, 1987); Report Regarding CRR Request for Findings and Fifth Supplemental Order No. 18,832 (September 15, 1987); Report Regarding Consumer Advocate Motion for Clarification and Sixth Supplemental Order No. 18,865 (October 2, 1987); Sixth Supplemental Order No. 18,873 (October 14, 1987); Report Regarding Consumer Advocate's Motion to Compel and Seventh Supplemental Order No. 18,880 (October 21, 1987); Report Regarding CRR Motion to Compel and Eighth Supplemental Order No. 18,881 (October 21, 1987); Report Regarding Motion to Rehear Order No. 18,881 and Motion for Enlargement of Time and Eleventh Supplemental Order No. 18,911 (November 18, 1987); and Report Regarding Motions, Closing of Record and Post Hearing Argument and Twelfth Supplemental Order No. 18,935 (December 21, 1987).

6 *In re Public Service Company of New Hampshire*, N.H. Supreme Court Docket No. 87-311 (January 26, 1988).

Our Order will issue accordingly.

Concurring:

March 24, 1988

| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
|---|---|---|
| Chairman | Commissioner | Commissioner |

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

THIRTEENTH SUPPLEMENTAL ORDER NO. 19,042

Upon Consideration of the foregoing Report, which is made a part hereof, it is hereby

ORDERED, that this petition is dismissed and the requested rate relief is denied as is detailed in the foregoing Report.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of March, 1988.

| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
|---|---|---|
| Chairman | Commissioner | Commissioner |

Attested by:

Wynn E. Arnold
Executive Director and Secretary

## APPENDIX C

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

*Report Regarding Request for Transfer*

On August 5, 1987 Public Service Company of New Hampshire (PSNH) filed an APPLICATION TO ALTER EXISTING RATES ON ACCOUNT OF EMERGENCY CIRCUMSTANCES (the Application). Along with its application, PSNH has requested that the Commission reserve, certify and transfer to the New Hampshire Supreme Court the controlling question of law, pursuant to RSA 365:20. This Report, the Order attached hereto, and the attached INTERLOCUTORY TRANSFER WITHOUT RULING grants the PSNH request for transfer but adds a second question of law to clarify the PSNH question.

The Commission recently concluded consideration of PSNH rates under New Hampshire Statutes in DR 86-122. In that Order the Commission made the following finding regarding PSNH's financial integrity and the operation of RSA 378:30-a:

> The Commission also finds that there is a lack of confidence in PSNH's financial integrity. However, this lack of confidence primarily stems from the interaction of PSNH's large investment in the Seabrook Nuclear Power Plant, the uncertainty of the operation of that plant due to NRC regulation, and the inability of PSNH to recover any part of the Seabrook investment in rates until that plant is in operation due to the operation of RSA 378:30-a. The record reflects that the PSNH investment in Seabrook is over four times the PSNH rate base. The uncertainty over this overwhelming component of PSNH's investment which is not under this Commission's control is the primary factor in PSNH's financial situation. Thus, the Commission is unable to substantially improve the confi-

> dence in PSNH's financial integrity via the setting of a rate of return.

Docket DR 86-122, *PSNH*, Report Regarding PSNH Motion for Rehearing and Seventeenth Supplemental Order No. 18,775, 9-10 (July 30, 1987). The Report and Order disposing of DR 86-122[1] and the Orders disposing of the Motions for Rehearing[2] indicate that PSNH did not request, and the Commission did not consider, placing construction work in progress in rate base as part of the process of developing just and reasonable rates for PSNH in DR 86-122. However, it seems that PSNH has placed this issue before the Commission at this time. Based upon the above quoted finding from docket no. DR 86-122 and the PSNH request, it seems likely that the Commission will need to know whether the Constitutional rights of PSNH allow or require the inclusion of portions of the PSNH Seabrook investment in rate base, despite the restrictions of RSA 378:30-a.

For these reasons and the reasons expressed in the attached INTERLOCUTORY TRANSFER WITHOUT RULING, the Commission transfers to the New Hampshire Supreme Court the question that PSNH has requested that we transfer. This question is as follows:

> Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> > (1) its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
> >
> > (2) its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and
> >
> > (3) accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity,

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1 Fourteenth Supplemental Order No. 18,726 (June 29, 1987.

2 Sixteenth Supplemental Order No. 18,774 (July 28, 1987) and Seventeenth Supplemental Order No. 18,775 (July 30, 1987.

> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called "anti-CWIP" statute?

The Commission also finds it appropriate to add a question to clarify the PSNH question. The Commission believes the PSNH question, as presented, could be narrowly read to address only PSNH's right to be heard. The Commission would find such information of little help if it did not also include information on PSNH's constitutional rights, if any, to *substantive* relief that RSA 378:30-a would otherwise prohibit. Thus, the Commission transfers the following additional question.

> Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, regardless of RSA 378:30-a?

Our Order will issue accordingly.

Concurring:

August 11, 1987

| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
|---|---|---|
| Chairman | Commissioner | Commissioner |

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

ORDER NO. 18,788

In consideration of the foregoing Report Regarding Request for Transfer and the attached INTERLOCUTORY TRANSFER WITHOUT RULING, which are incorporated herein by reference; it is

ORDERED, that the Commission will reserve, certify and transfer the questions of law listed in the foregoing report via its signing of the INTERLOCUTORY TRANSFER WITHOUT RULING attached hereto to the New Hampshire Supreme Court pursuant to RSA 365:20; and it is

FURTHER ORDERED, that PSNH shall, pursuant to Supreme Court Rule 9, file the appropriate number of copies of the INTERLOCUTORY TRANSFER WITHOUT RULING and its appendix with the New Hampshire Supreme Court.

By order of the Public Utilities Commission of New Hampshire this eleventh day of August, 1987.

| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
|---|---|---|
| Chairman | Commissioner | Commissioner |

Attested by:

Clair D. DiCicco
Assistant Secretary

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DR 87-151

Public Service Company of New Hampshire
Application to Alter Existing Rates on Account
of Emergency Circumstances

INTERLOCUTORY TRANSFER WITHOUT RULING

1. *Summary of the Case*

The petitioner, Public Service Company of New Hampshire (PSNH), has filed with the Public Utilities Commission an Application to Alter Existing Rates on Account of Emergency Circumstances (the Application). In conjunction with its Application, PSNH has requested that the Commission reserve, certify and transfer to the New Hampshire Supreme Court a controlling question of law, pursuant to RSA 365:20.

In its Application, PSNH requests that on or before October 1, 1987, the Commission allow PSNH approximately $70.98 million in additional annual revenues in the form of an emergency rate surcharge. To produce such revenues, PSNH proposes that the Commission allow PSNH a special emergency rate base increment consisting of a portion of PSNH's investment at October 31, 1986 in Unit I of its plant under construction at Seabrook Station. PSNH has further requested that the Commission provide a special emergency rate of return thereon at 15.28%, PSNH's cost of debt capital as determined by the Commission in PSNH's most recent rate case, DR 86-122, Report and Order No. 18,726 (June 29, 1987).

A New Hampshire statute, RSA 378:30-a, specifies that public utility rates shall not in any manner be based on the cost of construction work in progress. The Commission is accordingly prohibited by statutory law from allowing any return on PSNH's construction work-in-progress investment in Seabrook Station. By its terms, RSA 378:30-a bars PSNH's requested Emergency Surcharge.

However, PSNH contends that in its present circumstances, its existing rates are not just and reasonable, and that notwithstanding RSA 378:30-a, it is entitled as a matter of constitutional law to a hearing to establish just and reasonable rates in accordance with the standards set forth in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). PSNH further contends that when a utility's financial integrity is at stake, *Hope's* result-directed methodology for determination of "just and reasonable rates" precludes the application of a regulatory standard such as RSA 378:30-a as a bar to recovery of a fair return on prudently-incurred investment. *Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission*, 810 F.2d 1168 (D.C. Cir. 1987).[1]

Based upon this argument, PSNH has asked that the PUC transfer the issue of its right to a hearing to establish rates necessary to restore its financial integrity to this Court. While perhaps it is implicit in the PSNH question, the PUC desires to make explicit its concerns that any answer provided by the court provide guidance to the Commission on under what circumstances, if any, do PSNH's constitutional protections either require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to consumers. Thus, the Commission has clarified the PSNH request with a second question regarding this concern.

The questions of law that the Commission is transferring are set forth in full below. Based upon the Commission's findings in its recently concluded PSNH rate case, and the PSNH affidavits filed with the emergency rate request, the Commission anticipates that the questions set forth are likely to control the outcome of the PSNH request for emergency relief in PUC Docket No. DR 87-151. The Commission has not yet held hear-

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1 The Commission is aware that there are counter arguments to the PSNH contention that the restrictions of RSA 378:30-a are unconstitutional. Most discussion and case law occurs in the context of cancelled plant which will surely never operate. *See e.g.* J. Drobak, "From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation", 65 *Boston Univ. Law Rev.* 65, 123-24 (1985).

ings in this matter. The Commission provides the basic facts that it accepts for purposes of this transfer as follows below.

II. *Statement of Facts Accepted for Purposes of Transfer*

1. PSNH is a public utility as defined in RSA 362:2 that engages in the business of generation, transmission and sale of electricity that is ultimately sold to the public. Such sales are at rates regulated by the Public Utilities Commission (PUC). RSA Chapter 378. (PUC Orders in PUC Docket No. DR 86-122).

2. PSNH has a substantial investment in the Seabrook generating station. Unit I of that generating station is a nuclear generating facility that has not begun providing service. Unit II was a partially constructed nuclear generating unit that was cancelled. (PUC Orders in PUC Docket No. DR 86-122).

3. On May 29, 1986, PSNH filed for a rate increase with the PUC. Based upon a record that included materials filed or presented from that date through May 1987, the Commission provided PSNH approximately a 5% increase in revenues effective January 1, 1987. In that case, the Commission found as follows:

> The Commission . . . finds that there is a lack of confidence in PSNH's financial integrity. However, this lack of confidence primarily stems from the interaction of PSNH's large investment in the Seabrook Nuclear Power Plant, the uncertainty of the operation of that plant due to NRC regulation, and the inability of PSNH to recover any part of the Seabrook investment in rates until that plant is in operation due to the operation of RSA 378:30-a. The record reflects that the PSNH investment in Seabrook is over four times the PSNH rate base. The uncertainty over this overwhelming component of PSNH's investment which is not under this Commission's control is the primary factor in PSNH's financial situation. Thus, the Commission is unable to substantially improve the confidence in PSNH's financial integrity via the setting of a rate of return.

Report Regarding PSNH Motion for Rehearing and Seventeenth Supplemental Order No. 18,775, at 9-10 (July 13, 1987).

4. In establishing rates, the Commission generally employs the following cost based formula: R = E + V(r). In that formula:

R = the level of revenues which the utility is permitted to recover from ratepayers.

E = the utility's Operating Expenses (*e.g.*, salaries and wages, maintenance costs, depreciation and taxes).

V = the utility's Rate Base (*e.g.*, the depreciated cost of plant in service, working capital and materials and supplies which have been supplied by the utility's debt and equity investors).

r = the rate of return allowed by the Commission established on the basis of the utility's cost of debt and equity capital.

The Commission utilized this method in setting rates for PSNH is docket no. DR 86-122. [PUC Orders in DR 86-122; *Appeal of PSNH*, 125 N.H. 46, 49-50 (1984).]

5. On August 5, 1987, PSNH filed with the PUC an Application to Alter Existing Rates on Account of Emergency Circumstances (the Application). In conjunction with its Application, PSNH has requested that the Commission reserve, certify and transfer to the New Hampshire Supreme Court a controlling question of law, pursuant to RSA 365:20. The Commission assigned docket no. DR 87-151 to this matter.

In its Application, PSNH requests that on or before October 1, 1987, the Commission allow PSNH approximately $70.98 million in additional annual revenues in the form of an emergency rate surcharge. To produce such revenues, PSNH proposes that the Commission allow PSNH a special emergency rate base increment of $464.5 million. According to the application, this increase would result from including approximately 27% of PSNH's investment at October 31, 1986 in plant under construction at Seabrook Station and providing special emergency rate of return thereon at 15.28%, PSNH's cost of debt

capital as determined by the Commission in PSNH's most recent rate case, DR 86-122, Report and Order No. 18,726 (June 29, 1987).

6. Affidavits filed with the Application includes statements that, on their face, would support the following findings:

a. PSNH has not paid a dividend to its common or preferred stockholders since April, 1984. Nevertheless, after meeting costs of current operations, PSNH's revenues derived from rates do not generate sufficient cash to cover all of its costs, including interest on outstanding debt, maturities and construction costs. Assuming no resumption of dividends and expenditures at levels budgeted and projected as of the first quarter of 1987, PSNH forecasts a net cash deficiency of $657 million for the period 1987-1989. In each year of that period, PSNH's interest payment obligations alone exceed its cash derived from internal sources. (Affidavit of Robert J. Harrison, pages 1-2).

b. In the absence of sufficient cash from internal resources to meet its obligations, PSNH's only other method of obtaining cash is through the sale of its securities, i.e., through external financing. (Harrison Affidavit, page 2.)

c. PSNH's access to external financing has become so restricted as to be unavailable or not available on reasonable terms. PSNH investment bankers have informed the Company that there is no substantial market for its securities under present conditions. (Harrison Affidavit, pages 2-5.) PSNH's unsecured 17-1/2% Debentures due 2004 were traded during the week of July 20, 1987 to provide an annual yield to maturity of 35%. In its present circumstances, PSNH is foreclosed from access to the capital markets for public utility financings. (Affidavit of Francis E. Jeffries, pages 1-3.)

d. As a consequence of its insufficient internal cash resources and lack of access to external financing, PSNH has no present prospects of obtaining the cash necessary to make interest payments as they come due, to pay off its ex-

isting debt as it matures, nor to pay for construction necessary for expansion of service to its customers. PSNH's earnings are insufficient to enable it to attract capital or to maintain its credit or otherwise to support its financial integrity. (Harrison Affidavit, page 4; Jeffries Affidavit, pages 1-3.)

e. Three separate reports have been prepared that address the prudence of PSNH's Seabrook investment.

Pickard, Lowe & Garrick, expert engineers and management consultants, were retained by PSNH to conduct an audit of the prudence of PSNH's project management of Seabrook. That audit, conducted for over a year, included a 1,700-page analysis of PSNH's performance and found the Seabrook Project to have been prudently managed and all costs prudently incurred.

Also, several of the other Seabrook Joint Owners independently retained Challenge Consultants to examine Seabrook Project management. Challenge Consultants also found PSNH to have managed the Project and to have incurred costs prudently.

Most recently, the New Hampshire Public Utilities Commission, in connection with its independent investigation of Seabrook Project management, retained Touche Ross & Co. and The Nielsen-Wurster Group, Inc., to conduct a full, independent audit of PSNH's prudence in its management and investment in the Seabrook project. After more than nine months of study, including more than 130 interviews of personnel of PSNH, Yankee Atomic Electric Company (the Owner's Agent for the Seabrook project), United Engineers & Constructors Inc. (the Architect/Engineer and Construction Manager for the project), as well as the Company's investment and commercial bankers, and after reviewing hundreds of thousands of documents, these auditors concluded that more than 93% of the Seabrook investment was prudently incurred, which in terms of PSNH's share amounts to more than $1.6 billion.

f. PSNH's requested emergency rate base of $464.5 million of its investment in Seabrook Unit 1 corresponds very closely to PSNH's investment in Seabrook Unit No. 1 as of May 1, 1979 (just before the effective date of RSA 378:30-a), plus financing costs on that pre-enactment investment in the meantime. Such pre-enactment investment plus financing costs through September 30, 1987 will amount to $458.9 million. (Harrison Affidavit, page 11.)

g. PSNH estimates that in the event its financial emergency is not resolved in timely fashion and if it conducted business as usual, it would run out of cash in mid-October, 1987. PSNH states that it has instituted a cash conservation program. The filing seems to indicate that these measures should enable PSNH to maintain a positive cash position through approximately the end of 1987. (Harrison Affidavit, pages 11-13 and attachments G-H.)

h. RSA 378:30-a became effective May 7, 1979 and since that time the Commission has allowed no internal return based upon PSNH's investment in Seabrook Station. RSA 378:30-a has caused an increase in the size of PSNH's Seabrook investment to support financing costs associated with earlier financings, thus compounding the entire amount. The compounding effect of interest on construction-related debt under RSA 378:30-a has also magnified the impact of delays in the operation of Seabrook Station of PSNH's need for external financing. (Harrison Affidavit, pages 6-7; Affidavit of Charles E. Bayless, pages 1-5; Affidavit of J. Peter Williamson, pages 1-8.)

III. *Questions of Law*

The following questions of law are transferred in accordance with RSA 365:20:

1. Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,

(1) its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;

(2) its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and

(3) accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity,

Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called "anti-CWIP" statute?

2. Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, notwithstanding the requirements of RSA 378:30-a?

IV. *Reasons for Interlocutory Tranfer.*

PSNH's right to a hearing to establish just and reasonable rates, the constitutional concerns in setting constitutional rates, and the restrictions of RSA 378:30-a involves substantial questions of law. As was noted in the summary of the case provided above, arguments exist on both sides of these issues. The Commission believes the application or non-application of the restrictions of RSA 378:30-a are the central thrust of the PSNH question. Thus, the Commission has provided question 2 to assure the Court addresses these restrictions and does not solely address the right to be heard. The Commission is not empowered to resolve itself the question of the constitutionality of RSA 378:30-a as applied to PSNH's present situation. *Re PSNH*. 69 NHPUC 174, 178 (1984).

Because of the emergency circumstances alleged in the PSNH Application and supporting affidavits, PSNH has requested the immediate transfer of the question of law it drafted. For the same reason, the Commission has transferred both that ques-

tion and the second question listed above. Because the Commission has not yet held its first hearing on PSNH's Application, the Commission has not yet determined the parties to that proceeding. However, the Commission anticipates that PSNH's Application will be objected to and contested.

V. *Administrative Aspects of Case*

Attached in Appendix A are copies of pertinent constitutional and statutory provisions: U.S. Constitution amendment V; N.H. Constitution part 1, article 12; N.H. Constitution part 1 article 23; N.H. RSA 378:7; N.H. RSA 378:30-a. Also in Appendix A are the following three orders from PSNH's recently concluded rate case, Commission docket no. DR 86-122: REPORT AND FOURTEENTH SUPPLEMENTAL ORDER NO. 18,726 (June 29, 1987); and REPORT REGARDING CONSUMER ADVOCATE MOTION FOR REHEARING AND SIXTEENTH SUPPLEMENTAL ORDER NO. 18,774 (July 28, 1987); and REPORT REGARDING PSNH MOTION FOR REHEARING AND SEVENTEENTH SUPPLEMENTAL ORDER NO. 18,775 (July 30, 1987). Appendix A also includes the entire PSNH filing with the Commission: the PSNH cover letter, a PSNH Table of Contents, the PSNH rate application, the PSNH Proposed Tariff Page, the PSNH Affidavits, the PSNH Report Appendix, the PSNH Draft "Interlocutory Transfer Without Ruling", and the PSNH Memorandum of Law Supporting Right to Hearing and Relief. A copy of this "Interlocutory Transfer Without Ruling", Appendix A hereto and the attached Commission Report Regarding Request for Transfer and Order in docket DR 87-151 shall be hand delivered on this date to Counsel for PSNH, and the Attorney General's Office. The Commission has also provided copies of this material, without Appendix A, to all parties in PUC docket no. DR 86-122, PSNH's recently concluded rate case.

VI. *Counsel*

The name, address and telephone number of each lawyer in this case and the name of the respective clients are:

| *Lawyer* | | | |
|---|---|---|---|
| Martin L. Gross, Esq.<br>R. Carl Anderson, Esq. | Sulloway Hollis & Soden<br>PO Box 1256<br>9 Capitol St.<br>Concord, NH 03301 | 224-2341 | Public Company of New Hampshire |
| Stephen E. Merrill, Esq.<br>Attorney General<br>Larry M. Smukler<br>Senior Assistant Attorney General | Room 208<br>State House Annex<br>Concord, NH 03301 | 271-3658 | State of New Hampshire |

Lawyers for any further parties the New Hampshire Supreme Court may allow.

| Vincent J. Iacopino<br>Chairman | Bruce B. Ellsworth<br>Commissioner | Linda G. Bisson<br>Commissioner |
|---|---|---|

August 11, 1987

## APPENDIX D

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Petition of Public Service Company of New Hampshire (Public Utilities Commission) the court upon September 2, 1987 made the following order:

On August 11, 1987, the Public Utilities Commission transmitted an interlocutory transfer without ruling in the course of its consideration of DR 87-151, an application of Public Service Company of New Hampshire to "alter existing rates on account of emergency circumstances." *See* RSA 365:20. The questions transferred relate to the constitutionality of applying RSA 378:30-a, the so-called anti-CWIP statute, which was construed on non-constitutional grounds in *Appeal of Public Service Company of New Hampshire*, 125 N.H. 46, 480 A.2d 20 (1984).

In order to clarify the issues to be raised, an officer of this court conducted a prehearing evaluation conference on August 25, 1987, attended by representatives of the Public Service Company, the Attorney General, the Consumer Advocate and the Campaign for Ratepayer's Rights. It is clear from the discussion at conference, as well as from documents submitted to the court, that the commission and the parties do not seek a general ruling about the constitutionality of the statute viewed on its face. Rather, they desire a determination of its constitutionality as applied to the company's investment in the Seabrook I nuclear reactor, with reference to two sets of factual circumstances that the company claims to be true:

a. That the application of § 30-a precludes the company from "obtaining the cash necessary to make interest payments as they come due, to pay off its existing debt as it matures, [and] to pay for construction necessary for expansion of service to its customers."

b. That the application of § 30-a to investment commenced before the effective date of the statute is impermissibly retrospective.

The court does not sit as a fact-finding body on such a case transferred by the commission, nor can it provide the commission with a merely advisory opinion. It is equally important to recognize that the court should not decide a constitutional question, or a question on constitutional grounds, unless it is necessary to do so. The court therefore requires the commission to make findings sufficient to provide a factual basis for transferred constitutional questions, when those questions rest upon specific factual claims. The court made this plain over three years ago, when the commission and the company first sought a ruling on the constitutionality of § 30-a, without reference to findings of fact. In *Appeal of Public Service Company of New Hampshire, supra* at 48, 480 A.2d at 21, the court limited its answer to a transferred question about that statutory section "to the interpretation of the statute without regard to the constitutionality of its application, since the factual record was insufficient for informed consideration of constitutional issues."

The present interlocutory transfer does not satisfy the requirement to provide a factual basis. The commission has described the circumstances only by reference to "[a]ffidavits filed with the application [including] statements that, on their face, would support" certain findings. The court is thus being asked to make constitutional rulings of great import on the basis of specific facts that the commission has not found to be true and that are not otherwise before the court. This the court may not lawfully or responsibly do.

The court therefore defers acceptance of the transferred questions until the commission has addressed the following issues with findings of basic facts:

a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.

b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the

amounts of the company's investment prior to that date, between that date and the effective date of § 30-a, and thereafter.

Although it would not be appropriate for the court to set any schedule within which the commission should respond with such findings, the court is of the opinion that the findings can be made expeditiously after a hearing promptly convened and limited to the issues in question. Once the findings have been made, the court anticipates giving expedited consideration to the proferred transfer. All responsive pleadings filed in connection with the transfer will be held in abeyance to be docketed upon receiving the commission's response. Such pleadings may be amended not later than 5 days after the court's acceptance of the transferred questions.

RALPH H. WOOD

Ralph H. Wood, Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Petition of Public Service Company of New Hampshire (Public Utilities Commission) the court upon September 2, 1987 made the following order:

Motion for leave of court to file brief for amici curiae New Hampshire Electric Cooperative, Inc. is denied.

Ralph H. Wood,
Clerk

## APPENDIX E

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

*Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order*

Appearances: Martin L. Gross, Esq. of Sulloway, Hollis & Soden and Thomas R. Jones, Esq. of Cahill, Gordon & Reindel for Public Service Company of New Hampshire; Michael Holmes, Esq. and Joseph W. Rodgers, Esq. for the Consumer Advocate; Robert C. Hinkley, Esq. and Vaughn Tamzarian, Esq. of Hinkley and Hahn for the Campaign for Ratepayers Rights; Ian Wilson for the Business and Industry Association; Mark Bennett, Esq. for the City of Nashua, Town of Rye, and City of Manchester; Jeffrey J. Zellers, Esq. of Hall, Morse, Gallagher & Anderson for the New Hampshire Electric Cooperative, Inc.; Martin C. Rothfelder for the commission staff and the commission.

The commission opened this docket on August 5, 1987 pursuant to a petition by Public Service Company of New Hampshire (PSNH) to alter existing rates due to emergency circumstances. In addition to requesting such rate relief, PSNH requested that the commission transfer a question of law to the New Hampshire Supreme Court pursuant to RSA 365:20. On August 11, 1987, the commission transferred to the supreme court two questions related to the PSNH request pursuant to RSA 365:20. Report Regarding Request for Transfer and Order No. 18,788 (August 11, 1987). PSNH filed the statement regarding the transfer of these two questions with the New Hampshire Supreme Court on August 13, 1987. On September 2, 1987, the court deferred acceptance of the transferred questions until the commission has addressed two issues with findings of basic

facts. This Report and Order, and the forthcoming supplement to it as indicated below, constitutes our findings pursuant to that Order.

I. *Procedural History*

On September 3, 1987, the commission issued Second Supplemental Order No. 18,812 setting procedural aspects of this proceeding to deal with the September 2, 1987 order of the supreme court. Among other things, Order no. 18,812 set September 16, 1987 as the date for a hearing to develop a record to allow the commission to make findings of basic facts regarding the issues set forth by the supreme court in the September 2, 1987 Order. On September 4, 1987, the consumer advocate filed a motion for rehearing of Second Supplemental Order No. 18,812. The commission denied the consumer advocate's motion for rehearing of Second Supplemental Order No. 18,812 on September 14, 1987 in Third Supplemental Order No. 18,827.

On September 8, 1987, the consumer advocate filed a motion to transfer certain questions to the supreme court, which request was denied in Fourth Supplemental Order No. 18,828 (September 14, 1987).

On September 14, 1987, the Campaign for Ratepayers Rights (CRR), as did several other parties, made a filing to request that the commission make various findings of fact as a result of its proceeding set for hearing on September 16, 1987. Before the hearing on September 15, 1987, the commission denied CRR's request. The commission held hearings on September 16, 17, and 21, 1987 for the purposes of developing a record to make findings of fact related to the issues delineated by the September 2, 1987 supreme court Order.

At various times before and after the hearing the commission has received one or more filings on requests for findings from PSNH, CRR, and the consumer advocate. On September 22, 1987, PSNH submitted additional material in response to a request by Commissioner Bisson and asked that it be considered as an exhibit. On September 24, 1987 the consumer advocate filed a request that the commission consider certain responses to eight data requests as an exhibit in this proceeding and that

the commission accept as an exhibit a revision to exhibit 19. The consumer advocate has also filed material requesting that certain portions of the transcript be stricken. This request follows up on his motion to strike that he filed on September 17, 1987, which was granted by the commission, Commissioner Bisson dissenting, with clarification on stricken portions of transcript to follow. (Tr. Sept. 17, 1987, pp. 2-28 through 2-29). The commission takes action with regard to outstanding motions *infra*.

II. *The Supreme Court Order*

The Court deferred acceptance of the transferred questions until the commission has addressed the following issues with findings of basic facts:

> a. The claimed need to include some of the Company's investment in the Seabrook I reactor in the Company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due to pay off existing debt as it matures and to pay for the expansion of services to customers.
>
> b. The date upon which the Commission first authorized inclusion of such investment in the rate base, and the amounts of the Company's investment prior to that date, between that date and the effective date of § 30-a (sic) and thereafter.

Hereinafter, these two issues will be referred to as "issue a" and "issue b", respectively. The court stated that it "is of the opinion that the findings can be made expeditiously after a hearing promptly convened and limited to the issues in question." The court further indicated that it anticipated providing expedited consideration to this matter after the commission has made findings. From this direction, the commission makes the findings of facts expressed below.

The various parties to the proceedings, to some extent, disagreed as to what the Court required by the two issues it had delineated. For example, "issue a" was read in various ways with regard to the meaning of "the claimed need". For example, it was unclear whether the "claimed need" was the need to

place an item in rate base to provide additional dollars, or whether the Court wanted us to find either qualitative or quantitative facts about PSNH's claimed need for revenues. Thus, the findings of fact below attempt to provide findings which would answer all of those potential readings of that first issue area, except for an exact quantitative answer. Similarly, "issue b" was read in different ways with regard to what information and what dates were desired. Again, the commission has made findings of fact to provide a factual basis for various readings of issue b.

III. *Motions to Strike and Motions to Consider Additional Material*

On September 24, 1987, the consumer advocate indicated that in response to the commission's directions concerning the motion to strike that was granted on the record on September 17, 1987, lines 2-7, on page 162 of the transcript for day one should be stricken from the record. PSNH responded and indicated that it had no objection to that request. The consumer advocate has not identified any other portions of the transcript on any other day to be stricken. The commission finds the consumer advocate's request reasonable and strikes the above mentioned portion of the transcript.

Also on September 24 the consumer advocate requested that PSNH responses to eight data requests be considered as an exhibit. Those data requests are:

a. PSNH Response to OCA-137 (4 pages)
b. PSNH Response to OCA-138 (3 pages)
c. PSNH Response to OCA-139 (4 pages)
d. PSNH Response to OCA-140 (16 pages)
e. PSNH Response to OCA-141 (1 page)
f. PSNH Response to OCA-142 (1 page)
g. PSNH Response to OCA-143 (2 pages)
h. PSNH Response to OCA-144 (1 page).

The consumer advocate further requested that revised Attachments 1 and 2 to Exhibit 19 be accepted as an additional exhibit in this matter and marked as Exhibit 19A. The commission has

received no objection to these two requests for exhibits. The request seems reasonably related to various information which the consumer advocate became aware of late in the proceedings. For these reasons, the commission finds the request reasonable and grants the request for the exhibits.

CRR attached eight exhibits to a filing of September 25, 1987 designated as its requests for findings. CRR designated these exhibits as A-I. They are not part of the record in this case. CRR has not requested that the commission either take notice of these matters or consider them as evidence in this proceeding. Nevertheless, CRR certainly anticipated commission use of them, for it relies upon them in its requested findings of fact. The commission generally does not encourage unanticipated late filed exhibits for consideration in a proceeding and, further, generally requires a clear request by a party as to how they would like any such materials treated. The attachments seem to go to the issue of stockholder expectations for recovery in Seabrook I. The commission finds that this issue is not relevant to the issue areas delineated by the court. Thus, the commission declines to consider these exhibits.

On September 23, 1987, PSNH submitted an eight page response (including the cover letter) to a request for information from Commissioner Bisson. The exhibit also revises an investment number to which PSNH witness Wiggett testified. Since the document is one requested by the commission and is relevant to developing findings on PSNH's investment in Unit I, the commission shall consider this submittal as an exhibit.

IV. *Findings of Fact on Issue a*

With regard to issue a, PSNH takes the position that additional revenues must be raised through rate relief in order to provide service to customers, to make interest payments as they come due, to pay off existing debt as it matures, and to pay for expansion of service to customers. PSNH contends that its cash deficiency cannot be met from external financing sources, that application of conventional ratemaking methods will not meet its needs and that, absent an allowed return of approximately 52.8% on equity, inclusion of a portion of PSNH's investment

in Seabrook is necessary to produce sufficient increased revenue to meet its cash deficiency.

CRR asserts that inclusion of Seabrook in rate base is not necessary because other parts of the formula for developing a revenue requirement may be adjusted to provide additional revenue.

The consumer advocate takes the position that the commission should find that there is no need to include some of the Company's investment in Seabrook I reactor in rate base by the end of 1987. The consumer advocate bases his position on evidence which he states indicates that PSNH will have cash available at the end of 1987 due to various PSNH actions as well as the weakness of PSNH's evidence to back-up evidence on cash deficiency.

With regard to issue a, the Court has focused on the cash needed to make interest payments as they come due, to pay off debt as it matures, and to pay for the expansion of services to customers. This constitutes a part of the overall cash obligations of PSNH. PSNH must also pay for fuel expense, payroll and a myriad of other items. The commission finds it unlikely that PSNH would be in a position to meet the cash obligations that the court has listed, along with its other cash obligations, at the end of 1987 without cash beyond that provided by current rates.

The commission believes the evidence indicates that there are usually only two sources of funds for PSNH: external financing and rates. The commission finds that the financial markets are unwilling to provide additional new funds for PSNH due to investor perceptions of the high risk of PSNH. It is possible that the financial markets would be willing to obviate PSNH's need for cash by restructuring the existing debt obligations. PSNH is currently attempting to negotiate such action, but does not anticipate that it will occur before January 1, 1988. As part of those actions, PSNH anticipates not paying a 39 million dollar interest payment due on October 15, 1987.

An increase in current rates could be provided by this commission or the Federal Energy Regulatory Commission (FERC). This commission is unaware of any proceeding before

the FERC for an increase in the PSNH wholesale rates. In addition, the vast majority of the PSNH revenues come from retail sales under rates that are under the New Hampshire's PUC's jurisdiction.

The record reflects two rate related sources of cash in the New Hampshire jurisdiction other than an increase in current rates awarded by this commission. First, there is the potential of delaying a refund that PSNH owes to ratepayers as a result of its placing rates into effect under bond pursuant to RSA 378:6, paragraph III in docket DR 86-122. In that case, the commission subsequently found that the appropriate level of rate relief for PSNH was less than the bonded rates PSNH had placed into effect pursuant to RSA 378:6 III. Thus, PSNH is required to refund the overcollection under the bonded rates, with said refund to be provided to customers primarily through bill credits in November, 1987, a date established by an agreement among the parties and approved by the commission in docket no. DR 86-122. The evidence indicates that this refund, along with the interest that will be paid to customers, is reasonably calculated to be approximately $21,210,796. The evidence further reflects that delay of this refund past year end would probably result in PSNH being able to continue to meet its cash obligations into 1988. PSNH's continued ability to meet its obligations in 1988 minus rate relief would require successful restructuring of its debt to substantially reduce required interest payments. PSNH has not requested authorization to delay these refunds, and the commission does not intend to, *sua sponte*, authorize delay of these refunds.

A second, albeit theoretical, source of additional revenues for PSNH would be rate relief related to successful appeal of its recent rate case, NHPUC docket no. DR 86-122. PSNH has appealed the commission's finding in DR 86-122 on cost of capital and on a rate base adjustment related to deferred taxes. Those issues have a value of $13,967,941 and $444,921 on an annual basis, respectively. If PSNH prevails on these issues, the revenues resulting from this would not achieve the revenues that PSNH currently claims is necessary. Unless otherwise ordered by the Court, it is proper to assume that the commission's Or-

der in DR 86-122 is lawful and valid. The commission does not anticipate action on the appeal by the supreme court before year end. Thus, under the time assumptions above, and even under the assumption that PSNH does prevail in its appeal, this option does not seem to provide a route to provide timely additional cash for 1987.

The third and most realistic method of providing additional cash to PSNH is a rate increase. The commission traditionally provides rate relief by applying the following formula:

R = E + (V-d)r, where:

R = Operating Revenues (the Revenue Requirement)

E = Operating Revenue Deductions (Operating Expenses)

V = Value of Rate Base (plant in service and working capital)

d = Accrued or Accumulated Depreciation

r = Rate of Return (return on rate base)

The legislature seemed to anticipate, if not require, continued use of this methodology in adopting RSA 378:30-a, for the statute particularly mentions rate base and expense. The supreme court decision in *Appeal of Conservation Law Foundation*, 127 N.H. 606, 633-34 (1986) seems to indicate that this formula is the methodology for this commission to set rates. *See also*: *Appeal of PSNH*, 125 N.H. 46, 49 (1984). The commission recently concluded a traditional rate case for Public Service Company of New Hampshire using this traditional formula and awarding rate relief pursuant thereto. Docket No. DR 86-122, Report and Fourteenth Supplemental Order No. 18,726 (June 29, 1987).

Testimony in this case indicates that there are three methodologies within traditional rate making to adjust the formula and thereby result in a higher revenue requirement and higher rates for PSNH. First, portions of the company's investment in plant that 378:30-a does not allow in rate base, such as the Seabrook nuclear reactor unit I, could be included in rate base and would thereby provide for an increase in revenue requirement. This

would occur because PSNH would then earn on a larger share of its investment.

Second, PSNH's expenses could be adjusted to reflect costs of the capitalization (debt and equity) that currently are not covered in the development of revenue requirement. Under current ratemaking as constrained by RSA 378:30a, the Company's weighted cost of capital is applied to the rate base as constrained by RSA 378:30-a. However, PSNH's capitalization unquestionably exceeds its rate base and therefore the return on current rate base is substantially less than the return needed to service the capitalization. Expenses could be adjusted to reflect the debt service or return on equity, or both, in the capitalization that is now not currently reflected in rates. However, adjusting expense to cover capitalization in excess of that reflected in the rate base would result in covering capitalization related to the Company's investment in plant which is not yet or will not be providing service to customers (such as Seabrook I or Seabrook II). Reflecting such costs in expenses would result in the financing costs of such non-operating plants to be reflected in rates. The commission believes that RSA 378:30-a prohibits such action.

Third, the commission could enhance the Company's return on equity in order to increase the return on investment allowed in rate base under RSA 378:30-a. Testimony in this case indicates that to achieve the requested rate level would require authorizing the Company to earn 52.08% on equity. Adjustments for tax might lower that to approximately 34% on equity.[1] Both such returns on equity (52.08% and 34%) are far above the bounds that historically have been, or should be, awarded a utility. In the commission's opinion, authorizing such a return would merely circumvent the restrictions of RSA 378:30-a or, in other words, do indirectly what RSA 378:30-a prohibits the commission from doing directly. The supreme court has already indicated, in *Appeal of PSNH*, 125 N.H. 46, 55 (1984), that the commission may not adjust the rate of return to circumvent

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1 This approximate calculation is developed by taking the 52.08% in the testimony and multiplying it by (1.00-.34). The .34 is the federal tax rate.

RSA 378:30-a. Thus, adjusting the rate of return for PSNH as discussed above also seems to be prohibited by RSA 378:30-a.

Based on the foregoing, the commission finds that to put PSNH in a position where it is reasonably likely to meet its cash obligations including making interest payments as they come due under current obligations, paying off existing debt as it matures and paying for expansion of services for customers, PSNH would need additional revenues from a rate increase. Such rate relief need not necessarily be provided by adding a portion of the company's investment in Seabrook 1 in the company's rate base; but one or more of the following three methodologies must be utilized under traditional ratemaking to provide such revenues: inclusion of construction work in progress in rate base, enhancement of expenses to reflect capitalization that exceeds the allowable rate base, or enhancement of the rate of return. As discussed above, all such actions seem to violate the dictates of RSA 378:30-a and supreme court cases related thereto.[2]

V. *Findings of Fact on Issue b*

The first aspect of issue b asks for a finding of "the date upon which the commission first authorized inclusion of 'such investment' in rate base". The commission assumes that the term "such investment" focuses upon investment in the Seabrook I nuclear power plant referred to in issue a.

With regard to that issue, on May 25, 1978 the commission issued Report and Eleventh Supplemental Order No. 13,162 in docket no. DR 77-49, *Re: Public Service Company of New Hampshire*, 63 NHPUC 127 (1978). In that Report and Order, the commission first authorized the inclusion of construction work in progress in rate base for PSNH effective "with all bills based on successive meter readings, the latter of which is taken

2 The commission also notes that PSNH has not made a filing for a permanent rate increase. Uncontradicted testimony of staff witness Voll indicates that pursuit of rate relief based upon traditional criteria would not result in a "meaningful increase" in rates. The Commission finds that testimony and Dr. Voll's analysis reasonable. Thus, PSNH has asked for emergency rates that it clearly would not receive under traditional ratemaking.

on or after June 1, 1978.''[3] That order authorized construction work in progress to be included in rate base for the accumulated costs of Seabrook (both units I and II), Wyman No. 4, Millstone No. 3, and Pilgrim No. 2). Reports and Orders of this commission indicate that: 1) Seabrook No. I is a nuclear generating plant that today is near or at completion and awaiting a license from the Nuclear Regulatory Commission; 2) Seabrook No. II was a nuclear generating plant which was partially built and then cancelled; 3) Wyman No. 4 is an oil generating unit that is currently operating and in PSNH's rate base; 4) Millstone No. 3 is a nuclear generating unit of which PSNH owns a minority share, that is currently operational, and that was first included in PSNH's rate base in PSNH's last rate case, DR 86-122; and 5) Pilgrim No. 2 is a cancelled nuclear generating station upon which construction was begun but which was cancelled prior to completion. Reflection of the Wyman and Millstone plants in PSNH's rate base would include only PSNH's investment and not the investment of any co-owners.

The second part of issue b focuses on the amounts of the company's investment on specific dates. In response to this part of issue b, in these updated hearings parties presented information, to the best that could be determined, on PSNH's investment in Seabrook I at various dates. During the course of presentation of this data, it became clear that there are some discrete issue areas that make developing precise figures on PSNH's investment in Unit I more difficult than the court may have anticipated.

The source of the basic data that all parties relied upon is the information PSNH receives from the Seabrook project management as to total cash expenditures made at the project. Those cash expenditures are broken down into the cost of procuring and constructing Seabrook Unit I, the cost of procuring and constructing Seabrook Unit II, indirects, common plant, nuclear fuel, and land. Common facilities are facilities that service both Unit I and Unit II. Indirects consist of both labor and material which are defined as follows. Indirect labor is labor

3 PSNH, the Consumer Advocate and the Staff all indicate through testimony or pleadings a position that agrees with this finding.

used at the construction site that does not actually work on the units. Indirect materials are materials utilized at the construction site that do not actually become a part of the Units.

PSNH witness Wiggett indicated that the PSNH investment amounts presented in his testimony reflect combining the entire amount of Seabrook Unit I construction procurement costs, an allocation of indirects, and 100% of the cost of common facilities. The consumer advocate witness relies on the same basic data, but adjusts the investment numbers downward for a change in the PSNH ownership of the Seabrook station, for the education center, and for the termination yard. The staff witness relies on the same data and makes adjustments for the same three reasons.

The commission finds there are six general areas of controversy regarding these numbers based on the record before it. In the commission's opinion, indirects and common facilities present problems of allocation between Unit I and Unit II. The factual circumstances and the contentions of various parties contentions relating to the "educational center" and the "termination yard" also need to be addressed. Matching the dates of interest to the court to the investment data also present an issue as does PSNH's change of ownership from 50% to 35.56942%.

With regard to indirects, the record is not well developed on the methodology by which allocations were made between Unit I and Unit II. However, testimony of PSNH's witness indicates that the allocation to Unit I was more conservative than that advocated by an outside auditor hired by the Seabrook joint owners. Other witnesses for the staff and the consumer advocate accepted Mr. Wiggett's allocation and utilized it in developing their numbers. Thus, while the commission is concerned over the lack of a thorough record on the allocation mechanism, the commission finds that the allocation of indirects to Unit I is reasonable for the limited purpose at hand.

Each witness testifying on Seabrook Unit I investment included all the common plant at Seabrook Station as investment in Unit I. According to PSNH, 100% of the common plant should be applied to the Unit I investment. The witnesses for

the staff and the consumer advocate utilized this presentation of numbers and data that PSNH had provided and thereby also applied all of common plant to Unit I. As discussed above, common plant in the context of this case is plant common that was designed and built to service both Unit I and Unit II. An example is the tunnel at the Seabrook facility to carry cooling system water that was designed and built with capacity sufficient to serve both Units 1 and II.

PSNH witness Wiggett indicated that the accounting for common facilities is in accordance with the FERC regulations and standards within the industry. However, upon review the FERC Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 CFR part 101, there appears to be only one regulation dealing with common plant. That regulation, 18 CFR part 101, at 334; I FERC Statutes and Regulations ¶ 15,063, seems to address utility plant that is utilized for more than one utility service, (e.g. plant used for both service electric and gas), or plant that is used for both the relevant utility service and for non-utility services. With regard to such plant, the regulations indicate that allocations of such plant should be made among the various uses. The regulation also discusses the expenses related to common utility plant and requires an allocation of those as well. Based on our reading of the FERC regulation on the system of accounts, which this commission has adopted,[4] the regulation does not directly address accounting for plant that is common between two electric facilities. However, with regard to common plant, the regulation clearly follows the general concept of a reasonable allocation between the uses of common plant.

At the specific times of interest to the court—the time frame when the commission allowed CWIP in rate base and the effective date of the anti-CWIP statute—the joint owners were constructing both Unit I and Unit II. Based on that fact, and the lack of any other credible allocation between Unit I and Unit II, the commission finds it most reasonable to split the common plant in half between Unit I and Unit II for purposes of this

4 N.H. Admin. Rules, Puc 307.04.

docket.[5] However, the commission does not have in the record before it investment figures indicating the investment in common plant that PSNH included as part of Unit I. The commission deals with that data problem *infra*.

The consumer advocate and staff witnesses both reduced the PSNH recommended number on investment in Unit I by the cost of the education center located at Seabrook Station. PSNH included amounts in its investment costs that reflected its estimate of the investment in the center at the time of the data.

The education center is a center designed to provide education for the general public. The education provided, according to the Company witnesses, relates to Seabrook Station and nuclear power in general. The education center is currently in operation, and was allowed in rate base.

The commission finds that allocation of the education center to the Seabrook project is reasonable. The commission further finds it appropriate to allocate all of this item to the first unit that PSNH is expected to complete. Thus, allocating the entirety of the education center to Unit I is reasonable. PSNH's estimates of its actual invested amounts shall be utilized for this purpose.

The consumer advocate and staff witnesses both excluded the cost of the termination yard from the PSNH advocated numbers on investment in Unit I. PSNH included in its investment numbers costs that reflected its estimate of the investment in the termination yard at the time of the data. The termination yard is the main switching yard in the Seabrook Station. The plant there allows Seabrook owners to get Seabrook power, if and when any is produced, into the transmission grid. The plant provides the additional function providing additional needed transmission capacity from northern to southern New England. For the purpose of this proceeding, the commission, based on the record before it, finds it reasonable to allocate all of that termination yard to the Seabrook project and also finds it reasonable to allocate 100% of this plant to the first unit that

5 The Commission makes no finding here regarding the appropriate method to allocate plant for purposes of rate base once one plant of a two plant project is cancelled and the other is operating.

PSNH anticipated completing: Unit I. As with the education center, the PSNH presentation reflects the actual investment in the termination yard at specific dates. Thus, the PSNH data shall be used for investment in the termination yard.

The Court specifically requested the company's investment in the Seabrook I reactor prior to the date at which the commission first authorized inclusion of that investment in rate base. PSNH took the position that this request asks for the company's investment at the date of the issuance of the above referenced commission order authorizing CWIP in rate base. The staff, in response to that order, presented information on the investment included in rate base in that particular order, rather than the company's investment on the order's issuance date. The consumer advocate, in his request for findings, presents information on both. In addition, PSNH, responded to the evidence put in the record by the staff by placing into evidence data relating to investment included in the rate case that the order related to.

The commission finds that the words expressed in issue b request a finding on the company's investment on the date the commission issued its order first authorizing CWIP in rate base. However, reading issue b in context, it is also reasonable to conclude that the court may be interested in the investment that was authorized in the order. Thus, the commission makes findings in its schedule below that indicate the investment allowed in the order. Those numbers show PSNH's investment at April 30, 1977—the date for the end of the test year utilized for that rate case. In addition, the schedule below will reflect findings on PSNH's investment at May 31, 1978, six days after the commission formally authorized inclusion of such investment in rate base by its Order No. 13,162 (May 25, 1978). The divergence of the six days is required due to the monthly nature of the data that PSNH has and the fact that May 31, 1978 is the closest day to the date that the Court seems to be interested in.

RSA 378:30-a became effective on May 7, 1979. All parties seem to agree that this order should find PSNH's investment in Unit I on this date. Due to the monthly nature of the PSNH investment data, there is no evidence on investment for that pre-

cise date. Thus, the schedule below reflects findings for investment on April 30, 1979—seven days prior to the effective date of RSA 378:30-a.

In addition, the supreme court has asked for investment "thereafter". In response to that request, the commission has in its schedule below, developed investment totals on an annual basis. Throughout this period the commission has utilized the allocations discussed above.

The consumer advocate and staff presented testimony indicating that the numbers reflecting PSNH's investment in Seabrook I should be adjusted to reflect the eventual change in PSNH's ownership of Seabrook from 50% to 35.56942% after the enactment of RSA 378:30-a. In contrast, PSNH insists that the court asked for PSNH's investment and that subsequent action does not affect their investment in Seabrook in those earlier dates.

Uncontradicted evidence in the record indicates that PSNH engaged in transactions designed to reduce their ownership percentage in the Seabrook Unit I from 50% to 35.56942%. However, even at the time of those transactions, PSNH's cash investment did not decline. Instead, the change in PSNH's ownership was carried out by reducing PSNH's cash payments to the project in the time periods after the transaction took place. The commission agrees that if what the court wants is clearly PSNH's investment, the actual historical investment numbers should not be adjusted for a subsequent change in PSNH's ownership level. However, these historical investment numbers may or may not be the amount appropriate for consideration if the commission attempts to develop a pre-RSA 378:30-a rate base for ratemaking purposes. Thus, the commission declines to make an adjustment in its findings to reduce the amounts of historical investment to reflect the investment that would have existed at a 35.56942% ownership level.[6]

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6 Adjusting the historical investment to investment that would have existed at the 35.56942% level requires the investment to be multiplied by

$$\frac{35.569.42.}{50.0}$$

Based on the foregoing discussion, the commission provides the schedule below of PSNH investment. The investment numbers are not complete and need to be supplemented by subtracting 50% of PSNH's common plant from them. To determine the amount of common plant, the commission directs all active parties to this proceeding to appear in an additional conference of the parties at 9:00 a.m. on October 16, 1987. PSNH shall attempt to provide the active parties in this proceeding with appropriate figures for 100% of common plant, including associated AFUDC, at all the dates listed below at least 24 hours before this conference. The commission would expect parties to report on whether they can agree on those numbers or whether further procedures need to be developed to create a record or an agreement on those numbers at 10:00 a.m. on October 16, 1987. The commission shall, as soon as possible, supplement this order with the information on common plant and then consider its task complete with regard to the supreme court September 2, 1987 Order.

The schedule of PSNH investment in Seabrook Unit I, pursuant to issue b and as discussed above, is as follows:

PSNH INVESTMENT IN UNIT I

| *Date* | *PSNH Investment in Unit I* |
|---|---|
| 04/30/77 | $ 70,806,950 - (50% of common plant) |
| 05/31/78 | 165,651,870 - (50% of common plant) |
| 04/30/79 | 237,968,598 - (50% of common plant) |
| 12/31/79 | 320,092,938 - (50% of common plant) |
| 12/31/80 | 454,718,761 - (50% of common plant) |
| 12/31/81 | 495,159,536 - (50% of common plant) |
| 12/31/82 | 675,373,109 - (50% of common plant) |
| 12/31/83 | 940,656,402 - (50% of common plant) |
| 12/31/84 | 1,184,255,352 - (50% of common plant) |
| 12/31/85 | 1,468,061,969 - (50% of common plant) |
| 12/31/86 | 1,765,265,460 - (50% of common plant) |
| 07/31/87 | 1,919,311,861 - (50% of common plant) |

Our Order will issue accordingly.

Concurring:

October 14, 1987

| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
|---|---|---|
| Chairman | Commissioner | Commissioner |

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

CONCURRING OPINION OF COMMISSIONER LINDA G. BISSON

I concur with the foregoing decision of the majority but for the following clarification. For purposes of this proceeding I agree that, in the fullest interpretation of the term "investment", the Seabrook I construction costs and related AFUDC are $1,919,311,861. However, PSNH's investment in the education center ($884,370) and in the termination yard ($6,995,909) has been included in the Company's rate base for several years and should be deleted. Therefore, I believe that the following schedule more accurately reflects the Company's investment levels.

| | | *Adjustment for Assets Subsequently Placed in Rate Base* | | |
|---|---|---|---|---|
| *Date* | *Investment* | *Ed Ctr.* | *Term Yard* | *Adjusted Investment* |
| 04/30/77 | 70,806,950 | 136,004 | 213,333 | 70,457,613* |
| 05/31/78 | 165,651,870 | 890,433 | 956,318 | 163,805,119* |
| 04/30/79 | 237,968,598 | 1,063,924 | 659,723 | 236,244,951* |
| 12/31/79 | 320,092,938 | 1,124,722 | 4,857,386 | 314,110,830* |
| 12/31/80 | 454,718,761 | 1,146,217 | 7,252,975 | 446,319,569* |
| 12/31/81 | 495,159,536 | 1,148,573 | 7,252,975 | 486,757,988* |
| 12/31/82 | 675,373,109 | 1,161,072 | 6,995,909 | 667,216,128* |
| 12/31/83 | 940,656,402 | 884,370 | 6,995,909 | 932,776,123* |
| 12/31/84 | 1,184,255,352 | 884,370 | 6,995,909 | 1,176,375,073* |
| 12/31/85 | 1,468,061,969 | 884,370 | 6,995,909 | 1,460,181,690* |
| 12/31/86 | 1,765,265,460 | 884,370 | 6,995,909 | 1,757,385,181* |
| 07/31/87 | 1,919,311,861 | 884,370 | 6,995,909 | 1,911,431,582* |

*Less 50% Common Plant

LINDA G. BISSON

Linda G. Bisson
Commissioner

October 14, 1987

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

SIXTH SUPPLEMENTAL ORDER NO. 18,873

Upon consideration of the Report Regarding Findings Pursuant to September 2, 1987 supreme court order, which is incorporated herein by reference; it is

ORDERED, that the revised attachment 1 and attachment 2 to Exhibit 19 submitted by the consumer advocate on September 24, 1987 shall be marked as Exhibit 19A in this proceeding; and it is

FURTHER ORDERED, that Exhibit 35 shall be marked in this proceeding and it shall consist of the PSNH responses to consumer advocate data requests specified below:

PSNH Response to OCA-137 (4 pages)
PSNH Response to OCA-138 (3 pages)
PSNH Response to OCA-139 (4 pages)
PSNH Response to OCA-140 (16 pages)
PSNH Response to OCA-141 (1 page)
PSNH Response to OCA-142 (1 page)
PSNH Response to OCA-143 (1 page)
PSNH Response to OCA-144 (1 page);

and it is

FURTHER ORDERED, that the eight page response to Commissioner Bisson's request, including the cover letter dated September 22, 1987 from Susan B. Kullberg, shall be marked as Exhibit 36; and it is

FURTHER ORDERED, that this Order shall be supplemented with regard to data on common plant as detailed in the foregoing Report; and it is

FURTHER ORDERED, that this commission's response to the court's order of September 2, 1987 (as discussed at page 3 of the

court's order) is not complete until the issuance of that supplemental order.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of October, 1987.

| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
|---|---|---|
| Chairman | Commissioner | Commissioner |

Attested By:

_____

Wynn E. Arnold
Executive Director & Secretary

## APPENDIX F

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

SUPPLEMENTAL REPORT REGARDING FINDINGS PURSUANT TO SEPTEMBER 2, 1987 SUPREME COURT ORDER

Pursuant to the directions of the Commission, the parties to this proceeding convened a conference at 9:00 a.m. on October 16, 1987 to determine if agreement could be reached to quantify the amount of common plant investment that should be utilized to complete the table at page 24 of the Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order and Sixth Supplemental Order No. 18,873 (October 14, 1987) [hereinafter cited as October 14 Order]. At approximately 10:30 a.m. on that day, the parties informed the commission that the conference did not produce an agreement. Thus, the commission held a hearing to take evidence on this matter of common plant investment on October 22, 1987.

Based upon the evidence heard at that hearing the commission makes the following findings to supplement its October 14 Order. Evidence relevant to developing the required investment amounts appears in exhibits 36, 47, 48 and late filed exhibit 56,[1] as well as the oral testimony provided at the hearing on October 22. Column 2 of the table on page 24 of the October 14 Order, and column 2 of exhibit 36, page 2 (the page after the cover letter) include investment in Unit I along with 100% of common plant, the termination yard, and the education center. Pursuant to the October 14 Order, the commission desires to develop a final Unit I investment number that includes 100% of the termination yard and education center, but 50% of common plant. Exhibits 47, 48 and 56 contain reasonable numbers on common plant investment except that these exhibits include investment in

1 PSNH filed exhibit 56 on October 23, 1987 pursuant to direction of the commission during the October 22, 1987 hearing.

the termination yard and education center. Thus, the commission must adjust the numbers in exhibits 47, 48 and 56 to exclude the investment in the termination yard and education center.

In exhibit 36, page 2, columns 3 and 4 reflect investment in the education center and termination yard. However, those investment numbers include amounts recorded as common plant plus amounts of indirect costs associated with the termination yard and education center. Based on the testimony at the hearing, the commission finds it reasonable to assume that approximately 1/3 of the amounts listed in exhibit 36, page 2, columns 3 and 4 for the termination yard and education center are indirect costs.

Based on the foregoing, the commission shall develop final numbers for estimates of PSNH investment in Unit I for purposes of replying to the supreme court order as follows. First, the commission shall reduce the education center and termination yard figures in exhibit 36, page 2, columns 3 and 4, by one-third to remove indirect costs. These adjusted numbers reasonably approximate the common plant costs in the education center and termination yard. The commission subtracts these adjusted numbers from the common plant figures in exhibits 47, 48 and 56. The resulting numbers are the common plant numbers appropriate to fit into the formula and the table on page 24 of the commission's October 14 Order. The table below shows the results from completing the formula in the table on page 24 of the October 14 Order and constitutes the commission's findings on investment in Unit I. This report and order completes the findings with regard to the September 2, 1987 order in supreme court case no. 87-311.

PSNH INVESTMENT IN UNIT 1

| *Date* | *PSNH Investment in Unit 1* |
|---|---|
| 04/30/77 | 65,003,098 |
| 05/31/78 | 152,376,338 |
| 04/30/79 | 214,210,548 |
| 12/31/79 | 287,920,316 |
| 12/31/80 | 408,505,079 |
| 12/31/81 | 445,555,835 |
| 12/31/82 | 607,373,109 |
| 12/31/83 | 854,348,392 |
| 12/31/84 | 1,084,696,629 |
| 12/31/85 | 1,347,895,265 |
| 12/31/86 | 1,624,262,219 |
| 12/31/87 | 1,766,468,881 |

Our order will issue accordingly.

Concurring:

November 2, 1987

Vincent J. Iacopino
Chairman

Bruce B. Ellsworth
Commissioner

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

CONCURRING OPINION OF COMMISSIONER LINDA G. BISSON

I concur with the foregoing decision of the majority but, consistent with our October 14 Order, add the following clarification. For reasons stated in my concurring opinion of October 14, the schedule below adjusts investment to delete the education center and the termination yard. In my opinion, column 5 (the column to the far right) of the schedule below most accurately reflects the PSNH investment in Unit I.

| | | *Adjustment for Assets Subsequently Placed in Rate Base* | | |
|---|---|---|---|---|
| *Date* | *Investment* | *Ed Ctr.* | *Term Yard* | *Investment* |
| 04/30/77 | 65,003,098 | 136,004 | 213,333 | 64,653,761 |
| 05/31/78 | 152,376,338 | 890,433 | 956,318 | 150,529,587 |
| 04/30/79 | 214,210,548 | 1,063,924 | 659,723 | 212,486,901 |
| 12/31/70 | 287,920,316 | 1,124,722 | 4,857,386 | 281,938,208 |
| 12/31/80 | 408,505,079 | 1,146,217 | 7,252,975 | 400,105,887 |
| 12/31/81 | 445,555,835 | 1,148,573 | 7,252,975 | 437,154,287 |
| 12/31/82 | 607,373,109 | 1,161,072 | 6,995,909 | 599,216,128 |
| 12/31/83 | 854,348,392 | 884,370 | 6,995,909 | 846,468,113 |
| 12/31/84 | 1,084,696,629 | 884,370 | 6,995,909 | 1,076,816,350 |
| 12/31/85 | 1,347,895,265 | 884,370 | 6,995,909 | 1,340,014,986 |
| 12/31/86 | 1,624,262,219 | 884,370 | 6,995,909 | 1,616,381,940 |
| 07/31/87 | 1,766,468,881 | 884,370 | 6,995,909 | 1,758,588,602 |

LINDA G. BISSON

Linda G. Bisson
Commissioner

November 2, 1987

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

NINTH SUPPLEMENTAL ORDER NO. 18,890

Based upon the foregoing SUPPLEMENTAL REPORT REGARDING FINDINGS PURSUANT TO SEPTEMBER 2, 1987, SUPREME COURT ORDER, which is incorporated herein by reference; it is

ORDERED, that the foregoing report, along with the October 14 Order, constitutes the commission's findings pursuant to the supreme court order of September 2, 1987 in its case no. 87-311.

By order of the Public Utilities Commission of New Hampshire this second day of November, 1987.

| VINCENT J. IACOPINO | BRUCE B. ELLSWORTH | LINDA G. BISSON |
|---|---|---|
| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
| Chairman | Commissioner | Commissioner |

Attested By:

WYNN E. ARNOLD

Wynn E. Arnold
Executive Director & Secretary

## APPENDIX G

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

TENTH SUPPLEMENTAL ORDER NO. 18,901

WHEREAS, Public Service Company of New Hampshire filed for emergency rates in August of 1987; and

WHEREAS, the New Hampshire Public Utilities Commission issued on August 11, 1987 an Interlocutory Transfer Without Ruling which contained two questions; and

WHEREAS, subsequent to said date the supreme court remanded the matter to the New Hampshire Public Utilities Commission to make certain findings a fact; and

WHEREAS, the commission held hearings and by Order Nos. 18,873 and 18,890 respond to the request made by the supreme court; and

WHEREAS, subsequent to said orders the commission has substantially concluded its hearings regarding the merits of the emergency rate request; and

WHEREAS, in reviewing the record the commission has determined that there exists a question of law pertaining to the statutory interpretation of RSA 378:9 as it relates to RSA 378:30-a; and

WHEREAS, the commission determines that it is in the public interest to resolve the question of statutory interpretation to determine whether or not the commission has the statutory authority to grant emergency rate relief using standards other than the traditional ratemaking standards and to further determine whether or not the emergency rates can be based on a strictly cash flow need; it is therefore

ORDERED, that pursuant to RSA 365:20 that the following question of law be reserved, certified and transferred to the

New Hampshire Supreme Court with the further request that said question be joined with the questions docketed by the court as 87-311 and set forth in the Interlocutory Transfer Statement issued by the commission with Order No. 18,788 (August 11, 1987):

> 3. Does the proper interpretation of RSA 378:9, which provides that the commission may "temporarily . . . alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto . . ." when it finds that an emergency exists, allow the commission, upon the finding that an emergency exists, to depart from traditional ratemaking methods to establish temporarily rates which will allow a utility to meet cash flow requirements, notwithstanding the provisions of RSA 378:30-a?

By order of the Public Utilities Commission of New Hampshire this fifth day of November, 1987.

| VINCENT J. IACOPINO | BRUCE B. ELLSWORTH | LINDA G. BISSON |
|---|---|---|
| Vincent J. Iacopino | Bruce B. Ellsworth | Linda G. Bisson |
| Chairman | Commissioner | Commissioner |

Attested By:

WYNN E. ARNOLD

Wynn E. Arnold
Executive Director & Secretary

## APPENDIX H

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Appeal of Public Service Company of New Hampshire the court upon November 4, 1987 made the following order:

The public utilities commission (PUC) having filed its report and supplemental report making findings of basic facts in accordance with this Court's order of September 2, 1987, and the Court having considered the PUC's interlocutory transfer without ruling and the parties responsive pleadings, the interlocutory transfer is accepted and it is further ordered as follows:

1. The parties may on or before November 10, 1987, file amendments to their previously filed pleadings.

2. The brief previously filed by PSNH is docketed; PSNH may on or before November 16, 1987, file an amended brief; and any party supporting the position of PSNH shall file its brief on or before November 16, 1987.

3. Briefs of all other parties shall be filed on or before December 10, 1987, and oral argument shall be held on December 15, 1987.

Distribution:

Martin L. Gross
R. Carl Anderson
Margaret H. Nelson
Stephen E. Merrill
Larry M. Smukler
Wynn E. Arnold
Martin C. Rothfelder
Michael W. Holmes
Ralph Littlefield
Dom S. D'Ambruoso

Lt. Col. Vassey, Esq.
Dr. Charles E. Johnson
Gary A. Enders
Jeffrey J. Zellers
Robert C. Hinkley
Michael B. King

Ralph H. Woods,
Clerk

## APPENDIX I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Appeal of Public Service Company of New Hampshire the court upon November 17, 1987 made the following order:

The public utilities commission (PUC) has found it to be reasonably likely that Public Service Company of New Hampshire (PSNH) would need additional revenues from a rate increase in order to meet its cash obligations and that traditional ratemaking methods would not allow such an increase without violating RSA 378:30-a. *See* PUC report regarding findings pursuant to September 2, 1987 supreme court order, dated October 14, 1987, at 13-14. The court concludes, therefore, that it has an adequate basis to consider the third question transmitted by the PUC by tenth supplemental order no. 18,901, dated November 5, 1987, and accepts that question.

The brief of PSNH on the third question and of any party supporting its position on that question shall be filed on or before November 25, 1987, without continuance; the third question may be briefed by all other parties in the brief due on or before December 10, 1987, as provided in this court's order of November 4, 1987 in this case, without continuance; oral argument shall be held on December 15, 1987, at 10:00 a.m., as provided in the order of November 4, 1987.

The Consumer Advocate and the Campaign for Ratepayers' Rights may appear as parties. Each shall be allowed ten minutes of oral argument. Mary Chambers is given leave to file a brief amicus curiae.

PSNH motion for appearance of non-member of the New Hampshire Bar is granted.

The court will not rule prior to oral argument on the various motions for summary disposition. Those filing such motions may repeat the arguments contained therein in their respective

## APPENDIX I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Appeal of Public Service Company of New Hampshire the court upon November 17, 1987 made the following order:

The public utilities commission (PUC) has found it to be reasonably likely that Public Service Company of New Hampshire (PSNH) would need additional revenues from a rate increase in order to meet its cash obligations and that traditional ratemaking methods would not allow such an increase without violating RSA 378:30-a. *See* PUC report regarding findings pursuant to September 2, 1987 supreme court order, dated October 14, 1987, at 13-14. The court concludes, therefore, that it has an adequate basis to consider the third question transmitted by the PUC by tenth supplemental order no. 18,901, dated November 5, 1987, and accepts that question.

The brief of PSNH on the third question and of any party supporting its position on that question shall be filed on or before November 25, 1987, without continuance; the third question may be briefed by all other parties in the brief due on or before December 10, 1987, as provided in this court's order of November 4, 1987 in this case, without continuance; oral argument shall be held on December 15, 1987, at 10:00 a.m., as provided in the order of November 4, 1987.

The Consumer Advocate and the Campaign for Ratepayers' Rights may appear as parties. Each shall be allowed ten minutes of oral argument. Mary Chambers is given leave to file a brief amicus curiae.

PSNH motion for appearance of non-member of the New Hampshire Bar is granted.

The court will not rule prior to oral argument on the various motions for summary disposition. Those filing such motions may repeat the arguments contained therein in their respective

briefs. The arguments contained in the motions may not be incorporated by reference since the court will review the briefs prior to oral argument, but will not review the separately filed motions.

Ralph H. Wood,
Clerk

Martin L. Gross
R. Carl Anderson
Margaret H. Nelson
Larry M. Smukler
Wynn E. Arnold (PUC)
Martin C. Rothfelder
Michael W. Holmes
Ralph Littlefield (CAP)
Dom S. D'Ambruoso (BIA)
Lt. Col. Vassey, Esq.
Dr. Charles E. Johnson
Gary A. Enders
Jeffrey J. Zellers
Robert C. Hinkley
Michael B. King
File

## APPENDIX J

RE PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Intervenors: Legislative Utility Consumers' Council and Community Action Program.

DR 79-187, 17th Supplemental Order No. 14,012
January 28, 1980

*Order denying motions for rehearing of a commission order allowing an electric utility an emergency rate increase.*

*Revenues, § 10—Allowance for funds used during construction.*

The commission adopted a method of treating financing costs whereby allowance for funds used during construction were accumulated, capitalized, and charged to an electric company's construction work in progress account, together with other costs associated with construction; only when the plant became operational was the total labor and materials cost, as well as the accumulated allowance for funds used during construction, included in rate base. [1] p. 48.

*Procedure, § 33—Rehearing—Inadequate grounds.*

The commission denied a motion for rehearing regarding their order as to an electric company's construction work in progress account because the commission's treatment of the account was in compliance with the method adopted by the legislature. [2] p. 48.

*Return, § 4—Rate of return—Commission duty.*

The commission by law is bound to provide a utility the opportunity to earn not less than a reasonable return on the cost of property of the utility used and useful in the public service less accrued depreciation. [3] p. 49.

*Return, § 6—Rate of return—Amount to be allowed.*

In making the finding as to permanent rates, the commission must arrive at an acceptable method of calculating rates; rate of return cannot be artificially set, nor can it be excessive or extortionate. [4] p. 49.

*Return, § 35—Rate of return—Market conditions.*

A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally. [5] p. 51.

*Return, § 7—Calculation of return—Cost rates of equity and debt.*

The rule that the cost rates of all equity and debt issues should be included for the purposes of conducting the traditional method of calculating an overall rate of return has been a cornerstone of utility regulation even though the commission does retain its right to use a hypothetical capital structure where just and reasonable considerations dictate such a finding. [6] p. 53.

*Return, § 20—Rate of return—Amount to be allowed.*

A utility is entitled to a rate of return which is at minimum its cost of capital. [7], p. 53.

*Rates, § 354—Water heating surcharge—Transfer from residential to commercial customers.*

The commission ordered an electric utility to remove an emergency surcharge from residential controlled water heating rates and transfer the revenue impact to the commercial classification to be recovered on a per kilowatt-hour basis, except for controlled water heating commercial customers, which could continue to have an exemption from any emergency surcharge; the commission's action was necessitated by the President's call for less oil usage and greater conservation during the energy crisis, year-end figures which revealed larger increases in commer-

cial usage, and a contention as to the plight of the low-income consumers and the necessity for them to have an avenue to mitigate the rising costs of energy. [8] p. 54.

BY THE COMMISSION:

Supplemental Order

I. *Procedural History*

The commission issued a report and final Order No. 13,962 on December 26, 1979 (64 NH PUC 458), to be effective as of December 28, 1979. In that report and order, the commission allowed an emergency rate increase of $11,970,591. A legal interpretation was made that any motions for rehearing had to be filed by January 17, 1980. This legal interpretation was made known to all parties as was the commission's decision to render one decision in addressing any and all motions for rehearing. On January 8, 1980, the Legislative Utility Consumers' Council [hereinafter referred to as LUCC] filed a motion for rehearing. This filing was supplemented by a second filing on January 9, 1980.

On January 10, 1980, sixty-five members of the New Hampshire legislature filed a motion for rehearing. On January 16, 1980, the selectmen from Seabrook filed a motion for rehearing. On January 17, 1980, the Community Action Program (hereinafter referred to as CAP) filed a motion for rehearing. Community Action Program and the LUCC are the only full parties to the proceedings to file motions for rehearing.

II. *Standing*

The commission is concerned that the members of the New Hampshire legislature are not parties to the proceeding. Nor, for that matter, are the selectmen from Seabrook. The concerns of both of these groups revolves around the question of whether or not the commission's decision violates RSA 378:30-a. Since this concern is already raised by the motions for rehearing submitted by CAP and LUCC, the motions by these nonparties are

duplicative. Therefore, our response to the CAP and LUCC motions will be a sufficient answer to all motions.

III. *LUCC Motion for Rehearing*

The LUCC cites numerous grounds for rehearing: (1) that RSA 378:30-a precludes the discussion of the costs of construction and, therefore, is irrelevant for the establishment of rates; (2) that the emergency rates should have been denied since Public Service Company of New Hampshire (PSNH) cannot substantiate an increase of 5.5 percent over their current level of revenues; (3) that there is no resulting benefit to the ratepayer when utility profits are allowed to become astronomical; (4) the granting of an enhanced rate of return for the purpose of creating cash flow is an unconstitutional deprivation of the ratepayers' property without adequate compensation; (5) that the commission committed an error of law in finding that an emergency exists when the company is earning a rate of return, which is in excess of that allowed by this commission in DR 77-45; (6) that the commission committed error in its description of Professor Williamson's testimony; (7) that the commission failed in its statutory duty to follow RSA 363:17-b; (8) that the commission committed error as to its discussion of debt and preferred stock costs; (9) that the commission took improper notice of stating what would have been the case had not RSA 378:30-a been passed and that the $18 million increase is comparable to putting $180 million of CWIP in the rate base; (10) that the commission committed error on pp. 9 and 10 of its report where it made observations concerning the risk factors affecting PSNH now as compared to the situation in DR 77-49; (11) that the LUCC has been denied an opportunity to meet in appropriate fashion the factors upon which the commission relied; (12) that PSNH failed to inform either the parties or the commission as to the possibility of increased available funds; (13) that the commission committed error because it based its report and order on rates and charges that reflect construction; (14) that the commission committed error by ruling that RSA 378:30-a was not designed in consideration of construction from all elements of rate making; (15) that the commission

committed error by not disclosing Commissioner Stevenson's opinion that RSA 378:30-a is unconstitutional.

IV. *CAP's Motion for Rehearing*

Community Action Program asserts the following as grounds for rehearing: (1) that the commission's Order No. 13,962 is unreasonable, in that low-income ratepayers are being required to pay emergency rates when PSNH is not being required to take emergency measures to alleviate the financial crisis; (2) that the commission Order No. 13,962 is unreasonable because even though an emergency may exist, the crisis cannot be cured by the rates requested and the regulatory steps proposed by PSNH; (3) that the commission is basing rates upon the cost of financing the Seabrook construction project and, therefore, its action is unlawful; and (4) that the rates are unjust and unreasonable.

V. *Commission Analysis*

A. *Financing Costs*

Any public utilities commission has in essence two ways of treating financing costs. The first method is to include CWIP in rate base. The account, construction work in progress (CWIP), is included in rate base and thereafter earns a return, which represents the financing costs of plant under construction. The rate-making effect of such treatment is to increase rate base and thereby increase the rates to present consumers. *Because CWIP is added to rate base, the financing costs associated with construction are recovered currently.* (Emphasis supplied.) Legislative Utility Consumers' Council v Public Service Co. of New Hampshire (1979) 119 NH—, 31 PUR4th 333, 402 A.2d 626.

The second method is to exclude CWIP from rate base. The financing costs incurred during construction, AFUDC (allowance for funds used during construction), are accumulated, capitalized, and charged to the utility's CWIP account, together with other costs associated with construction. When the plant begins to actually generate electricity (in the case of an electric utility's generating plant) the rate base *then and only then* includes the total labor and materials costs, as well as the

accumulated AFUDC (financing costs). At this time of actual generation, the company earns a rate of return on the AFUDC and recoups the same by depreciation.

[1, 2] In DR 77-49, the commission adopted the first method, which resulted in present consumers paying the financing costs for CWIP currently. The legislature, by the passage of RSA 378:30-a, foreclosed the commission from basing rates and charges after May 7, 1979, on this method. Consequently, the commission after notice and hearing issued its report and order in DR 79-107. One of the effects of our order in DR 79-107 was to revert to the second method as to treatment of financing costs, AFUDC. When the generating units presently listed in PSNH's construction work in progress account actually begin to generate electricity, that is when this commission will pass on to consumers the costs of financing, labor, and materials for these plants. Public Service Company of New Hampshire has returned to its prior method (before DR 77-49) of accumulating and capitalizing financing costs, which will be passed on to consumers when the plants begin to generate electricity. There is simply nothing in our order that allows the financing costs associated with CWIP to be passed on to present consumers. Rather, the commission in Re Public Service Co. of New Hampshire (1979) 64 NH PUC 124; (1979) 64 NH PUC 312, has specifically removed all costs from construction out of rate base. Therefore, since the commission is not passing on to present consumers the cost of financing, these aspects of the motions for rehearing are rejected.

B. *Enhanced Rate of Return*

The LUCC and the members of the legislature who filed a motion for rehearing have alleged that the commission has allowed an enhanced rate of return. Counsel for the LUCC had originally asserted that this phrase appeared somewhere in PSNH's testimony. Later the counsel for the LUCC admitted that his office was unable to find any statement as to enhanced rate of return in the company's request, testimony, or exhibits. However, the allegation still remains supplemented by the as-

sertion that the commission is allowing astronomic profits. (See transcript 5-176, 6-48.)

[3] The commission has not allowed an enhanced rate of return. Seemingly, this concept is based on some misconception that the commission has found a level of return and just added some enhancing factor. This argument is simply false. The commission by law is bound to provide a utility the opportunity to earn not less than a reasonable return on the cost of property of the utility used and useful in the public service less accrued depreciation. RSA 378:27 28, 7.

[4] These statutes require the commission to allow an overall rate of return that is at a minimum the cost of capital. New England Teleph. & Teleg. Co. v New Hampshire (1949) 95 NH 353, 361, 78 PUR NS 67, 64 A2d 9. The New Hampshire supreme court has also found that the commission must disclose the method it uses to arrive at a reasonable rate of return as to permanent rates. New England Teleph. & Teleg. Co. v New Hampshire (1949) 95 NH 353, 358, 359, 78 PUR NS 67, 64 A2d 9. In addition, the commission must find a rate of return that is within the zone of reasonableness that is neither too low to be confiscatory, nor too high to be excessive and extortionate. New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 232, 233, 44 PUR3d 498, 183 A2d 237; Legislative Utility Consumers' Council v Public Service Co. of New Hampshire (1979) 119 NH—, 31 PUR4th 333, 402 A2d 626. The commission, therefore, must in making its finding as to permanent rates arrive at an acceptable method of calculating rate of return; and rate of return cannot be artificially set, nor can it be excessive or extortionate.

In determining a proper rate of return for any regulated utility, this commission breaks out the total capitalization of the company into its debt and equity components. These components are weighted and costed and then through mathematics used to arrive at the overall cost of capital. When the commission based its emergency rates finding on the fact that a higher rate of return was reasonable (as compared to DR 77-49) it was merely reflecting changes known in this proceeding and other proceedings involving this company and, for that matter, the

intervenors in this proceeding. (See Re Public Service Co. of New Hampshire [1979] 64 NH PUC 321; [1979] 64 NH PUC 324.)

For example, the cost rate of short-term debt is tied to the prime interest rate. Both Mr. Harrison and Mr. Williamson were aware of the prime interest rate, the recent dramatic rise in this rate since the last case, and the fact that the company's short-term debt is directly tied to the prime rate. (Transcript—December 13, 1979, pp. 71-73, Exh D, p. 1.)

As to the commission's eventual finding of a proper return on common equity, this commission is required to follow the general tests set forth in Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, PUR1923D 11, 67 L Ed 1176, 43 S Ct 675; Federal Power Commission v Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR NS 193, 88 L Ed 333, 64 S Ct 281. The relevant sections are as follows:

"A public utility is entitled to such rates as will 'permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties'; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally." (262 US 679, 692, 693 PUR1923D at pp. 20, 21.)

"The rate-making process under the [Natural Gas] Act—i.e., the fixing of 'just and reasonable' rates—involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Company case that 'regulation does not

insure that the business shall produce net revenues.' 815 US at p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . "By that standard the return to the equity owner should 'be commensurate with returns on investments in other enterprises having corresponding risks.' That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. . . ." (320 US 591, 603, 51 PUR NS at pp. 200, 201.)

In determining a final and permanent return on common equity, the commission will have the advantage of numerous witnesses, who will apply the aforementioned criteria of Hope and Bluefield to PSNH's present situation. However, when the commission is forced to make an examination based on RSA 378:9 and/or 27, the commission has not been afforded the option of a thorough review. Rather, that responsibility relates to the commission's decision on any permanent finding. New England Teleph. & Teleg. Co. v New Hampshire (1948) 95 NH 58, 62, 75 PUR NS 370, 57 A2d 267. New England Teleph. & Teleg. Co. v New Hampshire (1949) 95 NH 515, 518, 82 PUR NS 296, 68 A2d 114. If the commission's findings are too low or too high, when actual testimony is received relating to the Hope and Bluefield criteria, the legislature has provided avenues of address in the form of RSA 378:29 and 30.

The allegation that the commission has merely substituted return on equity for CWIP also is unfounded. The company's expense levels were last adopted for rate making at April, 1976, to April, 1977, levels. The commission has removed CWIP from rate base and has thereby reduced rate base below that used in the last proceeding The final determination as to a proper overall return, together with the increased expense levels and reduced rate base, will determine the direction of future rates. The commission will measure the various traditional cost rates

and determine a final overall return. See Priest, Book 1, "*Principles of Public Utility Regulation*," p. 209.

Neither the expenses of this company nor the rate base will reflect any financing, labor, or material costs associated with the account labeled "construction work in progress."

Since the commission will be making a finding as to a proper rate of return in the permanent rate case based on the application of legal criteria to testimony and exhibits, and where, further, both the consumers (RSA 378:30) and the investors (RSA 378:29) are protected during the interim, and, finally, where the expression of enhanced rate of return has neither any factual record, nor other support, the commission does not find any error in its decision.

C. *Astronomical Profits and Enhanced Return for Cash Flow*

The commission has already stated that it is in the process of conducting its full investigation into a proper rate level. The commission is bound by statute RSA 378:7 and New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 232, 233, 44 PUR3d 498, 183 A2d 237, not to allow either an excessive, extortionate, or confiscatory return. Our determination reflects this standard. In addition, the standard that a utility must be allowed an opportunity to earn a reasonable return so as to attract capital is reflected in our decision in this emergency proceeding and will also be reflected in our decision as to permanent rates.

Since the commission has found no factual basis for the assertion that the commission has made a finding of an enhanced rate of return, the commission finds no merit to the LUCC's contention.

D. *Return in Excess of That Allowed in DR 77-49*

[5] Just and reasonable rates are the touchstone for the establishment of rates in New Hampshire. New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 232, 44 PUR3d 498, 183 A2d 237, 240. A rate of return may be reasonable at one time and become too high or too low by changes af-

fecting opportunities for investment, the money market, and business conditions generally. Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, 692, 693, PUR1923D 11, 67 L Ed 1176, 43 S Ct 675.

The cost rates of new issues of debt and preferred stock have been higher than the average found in DR 77-49. The testimony of Mr. Williamson (transcript—December 13th at p. 105) and Mr. Meyer, indicate a higher return on common equity. Together they support a finding that the overall rate of return, to be at minimum the cost of capital, New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 44 PUR3d 498, 183 A2d 237 is higher now than in DR 77-49. Whether the commission has allowed a return unreasonably high or low will be the subject of the permanent hearings. Further changes in the economy, the prime rate, the money market, and business conditions may change the overall result. At this time, the commission rejects the LUCC's contention of error.

E. *Commission's Analysis of Professor Williamson*

Professor Williamson testified that he believed Public Service Company to be riskier than what it was at the time of the most recent rate increase (December 13th transcript, pp. 109, 105). Professor Williamson was also asked if the commission chose to base rates only on cost of service, was the range between 4.2 and 6.2 per cent increase? Professor Williamson indicated at that point in time that it was his best range (December 13th transcript, p. 90). The commission does not find any substance to the contention that it misstated Professor Williamson's testimony.

F. *Assertion that PSNH Failed to Inform the Commission and Parties that Additional Lines of Credit Were Available*

Counsel for the LUCC alleged in the LUCC's motion for rehearing that PSNH had failed to inform the commission and the LUCC as to the possibility of increased lines of credit from banks previously not involved with PSNH. Counsel for PSNH by letter to the commission has indicated various references in

the record to this possibility. (Public Service Company of New Hampshire Exh. E, at p. 4, transcript—pp. 2-279.) (The commission would also note staff Exh 5, staff Exh 6—p. 5.)

On January 23, 1980, counsel for the LUCC sent a letter to the commission, which indicated he agreed with the company's position. However, while no longer finding the company guilty of hindering the possibility of additional credit, the LUCC now turns its focus to the commission, the allegation being that the commission has failed to address with sufficient detail the possibility of this additional line of credit.

However, besides being a faulty contention as to error, the opinions of the commission indicated its awareness of the possibility of additional extensions of credit. (See line 1 of p. 9.) Furthermore, the entire opinion, which focused on the need to have a level of rates that attracted capital, is satisfactory proof that the commission desired to achieve additional areas of access to the capital markets. Therefore, the commission rejects the LUCC's contention as to this aspect of its motion for rehearing.

G. *The Commission's Analysis on Pages 9 and 10 of the Original Opinion*

The allegations made by the LUCC are that the findings on pp. 9 and 10 are without support on the record. Consequently, the LUCC argues that the LUCC has been deprived of an opportunity to address the factors relied upon by the commission. The LUCC cites the commission's attention to Legislative Utility Consumers' Council v Public Service Co. of New Hampshire (1979) 119 NH—31 PUR4th 333, 402 A2d 626. To begin with, even if there was not factual support on the record, the LUCC has the opportunity to meet these contentions in the permanent rate increase hearings. However, there is support in the record for the commission's findings.

The increased risk associated with the construction of nuclear plants has support in numerous places in the record. (Williamson, transcript, p. 110, middle p. 111—December 13, 1979; Harty Exh E, pp. 1, 3; also Meyer prefiled testimony.)

The finding as to the steady decline of the market and the chilling effect on stocks of utilities has support also within the

record. Mr. Meyer made repeated references to the Volker Saturday night massacre (transcript—December 12, p. 22, for example) and its effect on the electric utility market. Mr. Meyer found today's marketplace to be as difficult as any period since the 1974-75 crisis period. (Transcript—December 12th, p. 263.) The marketplace for PSNH's common stock, as well as for all electric utilities, has been on a downward slide (transcript—December 12th, p. 222).

The lack of progress on the divestiture has had an adverse impact on investors' confidence (transcript—December 12th, p. 272; Harrison Exh D, p.1). An adverse impact that unfortunately will be "enhanced" by actions taken after the commission rendered its decision.

Finally, the partial offset to the new increased risks of nuclear—namely, the recent increases in the price of oil—was recognized by the LUCC's own witness. (Transcript—December 13th, p. 110.)

Consequently, the commission has adequate support for its findings and will, therefore, reject this aspect of the LUCC's finding.

H. *Discussion of the Effects of RSA 378:30-a*

The commission had representations from the LUCC, CAP, as well as numerous members of the public, that the emergency rate increase was a variation of CWIP and against RSA 378:30-a. The commission had the issue placed before it, and due to RSA 373:17-b had to address the issue.

The LUCC's contention that the $18 million increase is comparable to putting $180 million in rate base is a perfect example of the assertions. When the hearings resumed as to the permanent rate determination, the LUCC again put forward this theory only to learn that they had forgotten to tax effect their result. Therefore, if one assumes: (1) that expense levels were the same as 1976-77; (2) that the rate of return was unchanged; (3) that there were no new additions to rate base of completed plant since 1977; and (4) there was no increased depreciation, the LUCC learned that the placement of $180 million in rate base would be an increase of $30 million, not $18 million. Fur-

thermore, all those other elements have not remained stable, and the present account for construction work in progress is closer to $500 million.

I. *Other LUCC Contentions*

The LUCC's other arguments revolve around its disagreement with the commission's interpretation of RSA 378:30-a. The commission finds that this new statute prohibits this commission from including CWIP in the rate base. The commission also finds that all financing costs, AFUDC, will be accumulated and capitalized until the units in the account, construction work in progress, are actually generating electricity. When this time comes, only then will the financing, labor, and material costs of these units be passed on to the consumer.

[6] The commission does find that the cost rates of all equity and debt issues (external capital) should be included for the purposes of conducting the traditional method of calculating an overall rate of return. This standard rule, which has been a cornerstone of utility regulation for decades, has not been altered by the passage of RSA 378:30-a. (The commission does retain its right to use a hypothetical capital structure where just and reasonable considerations dictate such a finding.) New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 44 PUR3d, 498, 183 A2d 237.

[7] The commission rejects, as it has repeatedly, the argument that RSA 378:30-a requires this commission to have evidentiary records void of any mention of a utility's construction program. Furthermore, this commission does not find any conflict with its interpretation of RSA 378:30-a, and the standard that a utility is entitled to a rate of return, which is at minimum its cost of capital. New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 44 PUR3d 498, 183 A2d 237.

As to Commissioner Stevenson's observations, it is clear that RSA 363:17-b does not require each commissioner to disclose each element of his or her decision process in arriving at his or her respective conclusion. Besides, since Commissioner Stevenson has left the commission, the issue is moot. The LUCC's other grounds for rehearing are denied.

*J. CAP's Contentions*

The commission has addressed many of CAP's contentions in responding to the LUCC's contentions. Community Action Program offers nothing new to its arguments and, therefore, the commission does not find merit to its motion for rehearing.

However, the contention that the commission must address not only the short-term considerations, but also the long term, is a valid point. The proper forum for consideration of the avenues open to the commission on both a short-term and a long-term basis are proper subjects for the hearings on permanent rates. Until that time, the commissions must deny CAP's motion. New England Teleph. & Teleg. Co. v New Hampshire (1948) 95 NH 58, 62, 75 PUR NS 370, 57 A2d 267.

[8] In addition, the commission finds that CAP's concern as to low-income users to be valid at least in part. The commission is attempting to encourage conservation and to the extent that low income and low and wise usage are comparable, the following should assist. Public Service Company of New Hampshire, at its earliest convenience during the month of February, 1980, will remove the emergency surcharge from residential controlled (off-peak) water heating rates and transfer that revenue impact to the commercial classification. This revenue will then be recovered from commercial customers on a per kwh basis, except for controlled water heating commercial customers, which will continue to have an exemption from any emergency surcharge. This action is necessitated by three factors: (1) the President's call for less oil usage and greater conservation during this moment of crisis; (2) year-end usage figures, which reveal larger increases in commercial usage than previously thought; (3) CAP's contention as to the plight of the low-income consumer and the necessity for these consumers to at least have an avenue to mitigate the rising costs of energy.

Consequently, the motions for rehearing are denied and Public Service Company is instructed to alter its rate structure pursuant to this order.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of January, 1980.

## APPENDIX K

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 87-311

PETITION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

NOTICE OF APPEAL

Public Service Company of New Hampshire, petitioner, hereby appeals to the Supreme Court of the United States from the Decision of the New Hampshire Supreme Court dated January 26, 1988. Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Public Service Company
of New Hampshire
By Sulloway Hollis & Soden

By _____
Martin L. Gross
9 Capitol Street
Concord, NH 03302-1256

March 25, 1988

CERTIFICATE OF SERVICE

I certify that I have this day mailed a copy of the within Notice of Appeal to Larry M. Smukler, Esquire, Assistant Attorney General, Michael W. Holmes, Esquire, Consumer Advocate and Robert C. Hinkley, Esquire, counsel of record for active parties.

March 25, 1988

_____
Martin L. Gross